(26,152)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 685.

ENEAS J. McCURDY, COUNTY TREASURER OF OSAGE COUNTY, OKLAHOMA, AND THE CITY OF PAWHUSKA, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 20, 1917.

1 In the District Court of the United States for the Western District of Oklahoma.

In Equity.

No. 201.

UNITED STATES OF AMERICA, Plaintiff,

v.

ENEAS J. MCCURDY, County Treasurer of Osage County, Oklahoma, and CITY OF PAWHUSKA, Defendants.

Citation.

United States of America to United States of America, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to an appeal allowed and filed in clerk's office of the United States District Court for the Western District of Oklahoma, wherein Eneas J. McCurdy, County Treasurer of Osage County, Oklahoma, and City of Pawhuska are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable John H. Cotteral, Judge of the United States District Court for the Western District of Oklahoma, this 4th day of September, 1917.

JOHN H. COTTERAL,
Judge of the United States District Court for the Western District of Oklahoma.

I hereby acknowledge and accept service of the above and foregoing citation on behalf of the United States of America, this 4th day of September, 1917, and hereby enter an appearance in said appeal for said appellee.

REDMOND S. COLE,
Asst. United States Attorney for the Western District of Oklahoma and Attorney of Record in said Cause.

[Endorsed:] 201. In Equity. United States of America v. Eneas J. McCurdy, County Treasurer of Osage County, Okla., and City of Pawhuska. Citation.
Filed Sept. 4, 1917. Arnold C. Dolde, Clerk, by Frank T. McCoy, Deputy.

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2 In the United States District Court for the Western District of Oklahoma.

In Equity.

No. 201.

UNITED STATES OF AMERICA, Plaintiff,

v.

LEE HOPKINS, County Treasurer of Osage County, Oklahoma, Defendant.

Complaint.

The United States of America, Plaintiff, for its complaint against the defendant, Lee Hopkins, County Treasurer of Osage County, Oklahoma, alleges and says:

That the defendant, Lee Hopkins, is the duly elected, qualified and acting County Treasurer of Osage County, Oklahoma, and that, as such, he has the power and authority, among other things, under the laws of the State of Oklahoma, to receive and collect taxes, issue certificates of redemption, and to sell land for taxes and issue a tax deed therefor;

That heretofore, to-wit, on or about the 9th day of March, 1913, one Norman Musselman and wife made, executed and delivered their deed in writing to H. H. Brenner, Trustee for Robert and Emma Panther, whereby there was conveyed Lot One (1) and the East Half of Lot Two (2), in Block Thirty-nine (39), in the City of Pawhuska, Osage County, Oklahoma, to H. H. Brenner, Trustee for Robert and Emma Panther;

That thereafter, on the 8th day of September, 1913, said H. H. Brenner, Trustee for Robert and Emma Panther aforesaid, made, executed and delivered his certain deed to the above described property, duly recorded September 13, 1913, to Robert Panther,

3 an incompetent Osage Indian, a member of the Osage Tribe of Indians in Oklahoma, and a ward of the Government and subject to the provisions of the treaties and Acts of Congress pertaining to said Tribe, and particularly the Act of Congress approved June 28, 1906, entitled: "An Act for the division of the lands and funds of the Osage Indians in Oklahoma Territory and for other purposes;" and acts supplementary to and amendatory thereof;

That, under the provisions of said Act of Congress, the United States segregated and placed to the credit of said Robert Panther, in the treasury of the United States, prior to the 9th day of March, 1913, his pro rata portion of the moneys and funds of the said Tribe of Indians, which said funds and moneys were, after the said segregation, held by the United States in trust for the said Robert Panther as provided by said Act of Congress, said trust period being twenty-five (25) years from and after January 1, 1907;

That the aforesaid conveyance of the said Norman Musselman and wife to H. H. Brenner, as Trustee for Robert and Emma Panther, and the subsequent conveyance of the aforesaid land by the said H. H. Brenner, Trustee for the said Robert and Emma Panther, to the said Robert Panther, was consummated and procured by the Secretary of the Interior and the Commissioner of Indian Affairs, acting through their duly authorized agents, on behalf of the United States, under authority of law, whereby said above described land was purchased for the use of the said Robert Panther, and the consideration therein paid; which was a large sum of money, to-wit, the sum of $1,750.00, and was paid by the plaintiff, the United States of America, out of the said trust funds and moneys held by the United
4 State for the benefit of the said Robert Panther, said land being purchased with the consent of the Secretary of the Interior, and under his direction, and upon the conditions imposed by him and the Commissioner of Indian Affairs that said property should be and remain property held in trust by the plaintiff for the benefit of said Robert Panther, and that the deed therefor to said Robert Panther should contain a clause, in substance as follows:

"This conveyance is made and accepted with the understanding, and under the condition that the above described property is to be and remain inalienable and not subject to transfer, sale or incumbrance for a period of eighteen years from the 1st day of July, 1913, except by and with the express consent and approval of the Secretary of the Interior, or his successor in office."

That a copy of said deed is hereto attached, marked "Exhibit A", and made a part hereof.

Plaintiff respectfully further shows that it appears from the tax roll of Osage County, Oklahoma, that there was due upon said above land, as taxes for the year 1912, the sum of $21.47, and there was due, as taxes for the year 1913, the sum of $52.60;

That on or about the first Monday of November, 1913, the County Treasurer of Osage County, Oklahoma, sold said land for the taxes due for the last half of the year 1912, and there was issued to the Bank of Commerce of Pawhuska, Oklahoma, a tax certificate thereto; that afterwards the said tax certificate was assigned to the American National Bank of Pawhuska whos is now the holder and owner of said tax certificate;

That there is due the sum of $97.02 for taxes for the years 1912 and 1913, inclusive of all penalties and all lawful charges against said land; and that there is no further or other lawful charge
5 against said land for taxes, penalties, or other charges by reason of the non-payment of said taxes for the year- 1912 and 1913;

That said sum, to-wit, $97.02, was, on the 18th day of January, 1917, and prior to the expiration of the redemption period allowed by the laws of Oklahoma, tendered said defendant, in lawful coin and currency of the United States of America, as payment for the taxes, penalties, and lawful charges against said land by reason of the non-payment of taxes for the years 1912 and 1913, and demand made that a redemption receipt be issued, and that said land be

cleared and freed of said charges for taxes and penalties, etc., all of which the said defendant refused and still refuses to do;

And that said sum, to-wit, $97.02 was, on the 18th day of January, 1917, tendered to said American National Bank of Pawhuska and demand made that he surrender and assign the tax certificate so held by him against said land, all of which the said American National Bank refused and still refuses to do;

That plaintiff is now ready, willing, and able to pay said sum due as aforesaid to the defendant and Charles F. Stuart, and hereby tenders into court said sum for the aforesaid purpose;

That the said American National Bank has applied to the said defendant for a tax deed in and to said land above described, by reason of the sale and issuance of tax certificate as aforesaid for the payment of taxes for the last half of the year 1912, and that the said defendant has threatened, intends to, and will, unless restrained by this Court, on the 25th day of January, 1917, issue to said American National Bank a tax deed, conveying said land to the said American National Bank; and that a great loss will happen to the plaintiff; and that it has no adequate remedy at law.

Wherefore, premises considered, Plaintiff prays that a tem-
6 porary restraining order issue against the said defendant, restraining him from issuing said tax deed to said land to the said American National Bank, or any other person, and, on final hearing, that injunction against such be made permanent; and for other proper relief.

W. BOOTH MERRILL,
Asst. United States Attorney.

STATE OF OKLAHOMA,
County of Logan, ss:

Geo. N. Wise, being first duly sworn, upon his oath, deposes and says; That he is an officer and agent of the plaintiff herein; that he has read the foregoing Bill and knows the allegations therein contained are true, except such allegations as are made upon information and belief; and, as to allegations so made, he verily believes them to be true.

GEO. N. WISE.

Subscribed and sworn to before me this 22nd day of January, 1917.

[SEAL.] M. V. HAWS,
Deputy Clerk, U. S. District Court,
Western District of Oklahoma.

Complaint Endorsed: No. 201. In The District Court of the United States for the West. Dist. of Oklahoma. United States of America vs. Lee Hopkins, Treasurer of Osage County, Oklahoma. Complaint. Filed January 22, 1917. Arnold C. Dolde, Clerk, by M. V. Haws, Deputy.

(CLERK'S NOTE.—Exhibit "A" referred to in the foregoing bill of complaint was not attached thereto as recited therein.)

7 In the United States District Court for the Western District of Oklahoma.

In Equity.

No. 201.

UNITED STATES OF AMERICA, Plaintiff,

vs.

LEE HOPKINS, County Treasurer of Osage County, Oklahoma, Defendant.

Order.

Now on this 8th day of February, 1917, the City of Pawhuska, a municipal corporation within the State of Oklahoma, having presented its petition praying that said City be permitted to intervene in the above entitled suit, and said petition having been considered,

It is hereby ordered that the said City of Pawhuska be permitted to intervene and defend in said suit.

JOHN H. COTTERAL, *Judge.*

Endorsed: No. 201. In Equity. In the United States District Court for the Western District of Oklahoma. United States of America plaintiff, vs. Lee Hopkins, County Treasurer of Osage County, Oklahoma, et al., Defendants. Order of Intervention. Filed Feby. 8, 1917. Arnold C. Dolde, Clerk.

8 In the United States District Court for the Western District of Oklahoma.

In Equity.

No. 201.

UNITED STATES OF AMERICA, Plaintiff,

vs.

LEE HOPKINS, County Treasurer of Osage County, Oklahoma, Defendant, and CITY OF PAWHUSKA, Intervening Defendant.

Amended Answer of Lee Hopkins.

Comes now the defendant, Lee Hopkins, Treasurer of Osage County, Oklahoma, and for his amended-answer to the complaint filed herein by the United States of America, admits the allegations therein contained, except such as are hereinafter denied.

This defendant denies that the plaintiff holds title to the lands de-

scribed in said complaint in trust for Robert Panther, or that the plaintiff has any title, right or interest in and to said described lands.

This defendant denies that the said Robert Panther is a ward of the plaintiff, insofar as the lands and taxes, the subject-matter of this litigation *is* concerned, and alleges that the said Robert Panther is a citizen of the United States and a citizen of the State of Oklahoma.

This defendant says that he has no knowledge as to the character and kind of funds used by the said Robert Panther in the purchase of the lands and lots described in the complaint, and does not know whether said funds and monies were trust funds, but alleges that they were such funds as would be charged and held by the United States for the payment of a tax by the said Robert Panther, under
9 the Federal Income Tax law now in force, and levied and collected for the purpose of maintaining and supporting the plaintiff, provided, the said Robert Panther should receive annually sufficient of the funds so invested in the lands and lots described to exceed the sum of four thousand dollars.

This defendant says that under an Act of Congress of March 3, 1905, commonly known as the Osage Townsite Act, chapter 1479, 33 Stat. 1061, and the sales and proceedings had thereunder, the Osage tribe of Indians and the plaintiff passed title to these lands described in said complaint to Norman Musselman, and his grantors, and that said lands afterwards became a part of the City of Pawhuska, in Oklahoma Territory; that on the — day of November, 1907, the Territory of Oklahoma became a part of the State of Oklahoma, one of the United States of America, the plaintiff herein, and the City of Pawhuska, aforesaid, became the City of Pawhuska, Osage County, within the State of Oklahoma, aforesaid, and one of the municipal corporations of said State; that the State of Oklahoma lives and maintains its standing on an equal footing with the other States forming and making the United States of America, the plaintiff herein, because of its right, authority and jurisdiction, to, and because of the fact that *is* does, levy and collect a tax on the lands described in the complaint herein, as well as other lands and property within the geographical limits of said State; that in pursuance of the laws of the State of Oklahoma, the lands described in said complaint were placed on the tax rolls of Osage County, and were assessed for taxation, for the maint*ai*nance of the State of Oklahoma, for the years of 1908 to 1916, both inclusive; that the plaintiff did not offer to pay to the treasurer of Osage County, this defendant, nor to the American National Bank, the taxes and penalties assessed against said
10 land described in the complaint for the years of 1914, 1915 and 1916, all of which taxes had become due and payable to the treasurer of Osage County, Oklahoma, and were paid to the treasurer of said county by the American National Bank, the holder of the tax certificate, and its assignor, said tax certificate having been issued by the treasurer of Osage County against said described land to cover the tax due on said land for the last-half of the year of 1912, as by laws of Oklahoma provided.

That under the laws of Oklahoma then, and now in force, as set

forth in section 7302 of the compiled laws of 1910, the lands described in the complaint are subject to levy and taxation by the State of Oklahoma, and its municipal corporations, said section 7302 reading and being as follows: "All property in this State, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation," and the lands described in said complaint do not come within any of the exemptions set forth in said laws of the State of Oklahoma.

This defendant denies that the plaintiff was acting under authority of law, as set forth in said complaint, and says that insofar as said deed to said described lands from H. H. Brenner to Robert Panther, and each and every of said transactions mentioned in said complaint, attempts, or purports, to take said described lands from without the authority and jurisdiction of the State of Oklahoma, and its municipal corporations, as a subject-matter of taxation by said State, the same are void, and all laws or regulations under which the plaintiff assumed to act are void, and the plaintiff, its Secretary of the Interior, its Commissioner of Indian Affairs, and all other officers and agents, each and every of them, was acting without legal au-
11 thority, and in violation of the spirit and the letter of the Constitution of the United States of America, and more particularly its preamble, its Section 3 Article 4, providing that "New States may be admitted by the Congress into this Union", its Ninth Amendment, wherein it is provided that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people", and its Tenth Amendment, wherein it is provided that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Wherefore, this defendant prays that the complaint filed herein be, by this Court, dismissed, and all proceedings had thereunder dissolved and held for naught, and for such further relief as to the Court may appear just and equitable.

LEE HOPKINS,
By CORBETT CORNETT,
County Attorney of Osage Co., Oklahoma,
By P. A. SHINN.

PRESTON A. SHINN,
Of Counsel.

Endorsed: No. 201. In equity. United States of America, Plaintiff, vs. Lee Hopkins, County Treasurer of Osage County, Oklahoma, and the City of Pawhuska, Defendants. Amended Answer of Lee Hopkins. Filed Feby. 12, 1917. Arnold C. Dolde, Clerk, by M. V. Haws, Deputy. Corbett Cornett, and Preston A. Shinn, Solicitors.

12 In the United States District Court for the Western District of Oklahoma.

In Equity.

No. 201.

UNITED STATES OF AMERICA, Plaintiff,

vs.

LEE HOPKINS, County Treasurer of Osage County, Oklahoma, Defendant, and CITY OF PAWHUSKA, Intervening Defendant.

Amended Answer of the City of Pawhuska.

Comes now the City of Pawhuska, and for its Amended answer to the complaint filed herein by plaintiff, admits the allegations therein contained, except such as hereinafter denied.

This defendant denies that the plaintiff holds the lands described in said complaint in trust for Robert Panther, or that the plaintiff has any title, right or interest in and to said lands.

This defendant denies that the said Robert Panther is a ward of the plaintiff insofar as the lands and taxes, the subject-matter of this litigation *is* concerned, but alleges that the said Robert Panther is a citizen of the United States and a citizen of the State of Oklahoma.

This defendant says that it has no knowledge as to the character and kind of funds used by the said Robert Panther in the purchase of the land and lots described in the complaint, but alleges that they were such funds as would be charged and held liable by the plaintiff to the payment to the plaintiff, by the said Robert Panther, of the Federal Income Tax now in force, and levied for the purpose of maintaining and supporting the plaintiff, provided, the said
13 Robert Panther should receive an amount annually in excess of four thousand dollars.

This defendant says that under an Act of Congress of March 3, 1905, commonly known as the Osage Townsite Act, chapter 1479, 33 Stat. 1061, and the sales and proceedings had thereunder, the Osage tribe of Indians, and the plaintiff, sold the lands described in said complaint, and the Indian title thereto, passed to Norman Musselman, and his grantors, and that said described land afterwards became a part of the City of Pawhuska, in Oklahoma Territory; that on the — day of November, 1907, the Territory of Oklahoma became a part of the State of Oklahoma, one of the United State of America, the plaintiff herein, and the City of Pawhuska, aforesaid, became the City of Pawhuska, Osage County, within the State of Oklahoma, aforesaid, and one of the municipal corporations of said State; that the State of Oklahoma lives and maintains its standing on an equal footing with the other States forming and making the United States of America, the plaintiff herein, because of its right, authority, and jurisdiction to, and because of the fact that it does,

levy and collect a tax on the lands described in the complaint herein, as well as other lands and property within the geographical limits of said State; that in pursuance of the laws of the State of Oklahoma, the lands described in said complaint were placed on the tax rolls of Osage County, and were assessed for taxation, and for the maintainance of this defendant, and the State of Oklahoma, for the years of 1908 to 1916, both inclusive; that the plaintiff did not offer to pay to the treasurer of Osage County, nor to the American National Bank, the taxes and penalties assessed against said described land for the years of 1914, 1915, and 1916, all of which taxes had
14 become due and payable to the treasurer of Osage County, Oklahoma, and were paid to the treasurer of said County by the American National Bank, the holder of the tax certificate, and its assignor, said tax certificate having been issued by the treasurer of Osage County against said described land to cover the tax due on said land for the last-half of the year of 1912, as by the laws of Oklahoma provided.

That under the laws of Oklahoma, then and now in force, as set forth in section 7302 of the compiled laws of 1910, the lands described in the complaint are subject to levy and taxation by the State of Oklahoma, and its municipal corporations, said section 7302 reading and being as follows: "All property in this State, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation," and the lands described in said complaint do not come within any of the exceptions set forth in said laws of the State of Oklahoma.

This defendant denies that the plaintiff was acting under authority of law, as set forth in said complaint, and says, that insofar as said deed to said described lands from H. H. Brenner to Robert Panther, and each and every of said transactions mentioned in said complaint, attempts, or purports, to take said described lands from without the authority and jurisdiction of the State of Oklahoma, and its munic-pal corporations, as a subject-matter of taxation by said State, and this defendant, the same are void, and all laws and regulations under which the plaintiff assumed to act are void, and the plaintiff, its Secretary of the Interior, its Commissioner of Indian Affairs, and all other officers and agents, each and every of them, was acting without legal authority, and in violation of the spirit and the letter
15 of the Constitution of the United States, and more particularly its Preamble, its Section 3 of Article 4, providing that "New States may be admitted by the Congress into this Union", its Ninth Amendment, wherein it is provided that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people", and its Tenth Amendment, wherein it is provided that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Wherefore, this defendant, the City of Pawhuska, prays that the complaint filed herein, be, by this Court, dismissed, and all proceedings had thereunder dissolved and held for naught, and for such

other and further relief as to the Court may appear just and equitable.

CITY OF PAWHUSKA,
By PRESTON A. SHINN,
Its Solicitor.

Endorsed: No. 201. In Equity. United States of America, Plaintiff vs. Lee Hopkins, County Treasurer of Osage County, Oklahoma, and City of Pawhuska, Defendants. Amended Answer of the City of Pawhuska. Filed Feby. 12, 1917. Arnold C. Dolde, Clerk, by M. V. Haws, Deputy. Preston A. Shinn, Solicitor.

16 In the District Court of the United States for the Western District of Oklahoma.

In Equity.

No. 201.

UNITED STATES OF AMERICA, Plaintiff,

v.

LEE HOPKINS, County Treasurer of Osage County, Oklahoma, Defendant; CITY OF PAWHUSKA, Intervening Defendant.

Amended Agreed Statement of Facts.

The plaintiff, United States of America, and the defendant, Lee Hopkins, and the intervening defendant, City of Pawhuska, hereby agree that the above entitled suit may be tried upon the following statement of fact, and hereby agree that they are the facts as would appear if the evidence was taken and heard in said suit.

1. That Eneas J. McCurdy is the successor in office of the said defendant, Lee Hopkins, and the said Eneas J. McCurdy is at this time the County Treasurer of Osage County, Oklahoma, and the said Preston A. Shinn, solicitor for the said Eneas J. McCurdy, hereby enters the appearance of Eneas J. McCurdy, Treasurer, as defendant herein.

2. That Lee Hopkins, heretofore Treasurer of Osage County, Oklahoma, did refuse to accept of the sum of Money tendered him by the plaintiff herein, the tax on the lands in question, his refusal being for the reason that the tender did not include the sums due for the years of 1914, 1915, and 1916, the tax for these years being due and payable, if the lands were subject to taxation after title passed to Robert Panther, a member of the Osage Tribe of Indians.

3. That the American National Bank, the holder of the tax
17 certificate, also refused to accept of the sum tendered by the plaintiff as the tax due on said lands, but for the reason that the plaintiff only tendered the taxes for the years of 1912 and 1913, and failed to tender the amount due for the years of 1914, 1915, and 1916, said sums having been paid by the American National Bank

to the Treasurer of Osage County, Oklahoma, and that said sums for said years for the taxes on said lands were due and payable to the American National Bank, if said lands were subject to taxation by the State of Oklahoma after the title thereto had passed to Robert Panther, an Osage Indian.

4. That the moneys paid for said lots and lands were a part of the fund segregated and placed to the credit of Robert Panther by authority of the Act of Congress approved June 28, 1906, and known as the Osage Allotment Act; that the deed referred to in the complaint herein, in addition to the ordinary provisions, contained this clause:

"This conveyance is made and accepted with the understanding, and under the condition that the above described property is to be and remain inalienable and not subject to transfer, sale or incumbrance for a period of eighteen years from the 1st day of July, 1913, except by and with the express consent and approval of the Secretary of the Interior, or his successor in office."

5. That the lands in question and assessed for taxation for the years of 1914, 1915, and 1916, were subject to taxation by the laws of Oklahoma, unless because of the fact that said lands were purchased with the funds segregated by the Osage Allotment Act and placed to the credit of Robert Panther, a non-competent member of the Osage Tribe of Indians, under authority and direction
18 of the Secretary of the Interior, as alleged in plaintiff's Bill of Complaint, not inconsistent with the facts herein stipulated.

6. This amended agreed statement of facts is intended to supersede the agreed statement of facts filed herein on August 22, 1917, and is submitted for the purpose of more clearly setting forth the basic facts.

REDMOND S. COLE,
Assistant United States Attorney.

PRESTON A. SHINN,
Solicitor for Eneas J. McCurdy,
County Treasurer of Osage County, Oklahoma.

PRESTON A. SHINN,
Solicitor for City of Pawhuska.

Endorsed: No. 201. Equity. In the District Court of the United States for the West. Dist. of Oklahoma. United States of America, Plaintiff vs. Lee Hopkins, County Treasurer of Osage County, Oklahoma, Defendant, City of Pawhuska, Intervening Defendant. Amended Agreed Statement of Facts. Filed Sept. 4, 1917. Arnold C. Dolde, Clerk, by Frank T. McCoy, Deputy.

19 In the Distdict Court of the United States for the Western District of Oklahoma.

In Equity.

No. 201.

UNITED STATES OF AMERICA, Plaintiff,

v.

ENEAS J. MCCURDY, County Treasurer of Osage County, Oklahoma, and CITY OF PAWHUSKA, Defendants.

Decree.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz;

That Eneas J. McCurdy, County Treasurer of Osage County, Oklahoma, and the successor in office of Lee Hopkins, be, and he is hereby substituted for Lee Hopkins as defendant in this cause;

That the real property involved herein which was sold at tax sale by the County Treasurer of Osage County, Oklahoma, was purchased for Robert Panther, a non-competent member of the Osage Tribe of Indians, under authority of law and instructions of the Secretary of the Interior, with trust moneys of Robert Panther, provided for in and as authorized by, the Act of Congress approved June 28, 1906; that the restriction clause contained in said deed therefor to Robert Panther requiring the consent of the Secretary of the Interior before Robert Panther could sell said lands, was in furtherance
20 of the policy of the United States of America in dealing with the Osage Indians; that the trust character impressed on these purchase moneys by the said Act of June 28, 1906, followed them into the said real property purchased therewith, in accordance with the provisions of the restriction clause contained in said deed of conveyance to Robert Panther, and while so held constitutes an instrumentality lawfully employed by the Government for the protection of said Indian, and effectively withdrew said real property from subsequent taxation by the State of Oklahoma and its subdivisions; that the Federal constitutional inhibitions, pleaded and urged by the defendants will not avail, when the land so purchased is in furtherance of the Governmental policy of dealing with the property of the Osage Indians as aforesaid.

That Eneas J. McCurdy, County Treasurer of Osage County, Oklahoma, should be, and he is hereby enjoined from making, issuing or delivering a tax deed to Charles F. Stuart, the American National Bank of Pawhuska, Oklahoma, or to any other person, or corporation, for Lot One (1) and the East Half (E. ½) of Lot Two (2) in Block Thirty-nine (39) in the City of Pawhuska, Osage County, Oklahoma, based on any sale for taxes imposed after the date of said

deed, and during the period of said restriction therein and that the said injunction shall be in force and effect upon the successors in office of the defendant, Eneas J. McCurdy.

It is further ordered that the costs in this cause be taxed against Eneas J. McCurdy, County Treasurer of Osage County, Oklahoma.

To which decree of the Court and every part thereof, the defendants, and each of them, except, and the defendant, Eneas J. McCurdy, County Treasurer of Osage County, Oklahoma, and the de-
21 fendant, City of Pawhuska, on the day this decree is rendered and in open court, each, gives notice of, and prays the court for, an appeal from the said decree to the Supreme Court of the United States, which appeal is by the Court allowed in open session, upon the giving by the defendant, jointly, of a bond conditioned as provided by law in the sum of Five Hundred and no/100 Dollars ($500.00).

Dated September 4, 1917.

JOHN H. COTTERAL,
District Judge.

Endorsed: No. 201. United States vs. Eneas J. McCurdy, County Treasurer of Osage County, Oklahoma et al. Decree. Filed Sept. 4, 1917. Arnold C. Dolde, Clerk, by Frank T. McCoy, Deputy.

22 In the District Court of the United States for the Western District of Oklahoma.

In Equity.

No. 201.

UNITED STATES OF AMERICA, Plaintiff,

v.

ENEAS J. MCCURDY, County Treasurer of Osage County, Oklahoma, Defendant, and CITY OF PAWHUSKA, Intervening Defendant.

Petition for Appeal.

To the Honorable John H. Cotteral, United States Judge for the Western District of Oklahoma:

The above named defendants feeling aggrieved by the decree made and entered in the above entitled suit on the 4th day of September, 1917, do, each, hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith, and each of the defendants pray- that an appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Supreme Court.

Your petitioners further pray that the proper order touching the security to be required of them to perfect this appeal be made.

PRESTON A. SHINN,
Solicitor for Each of said Defendants.

The foregoing prayer for an appeal is hereby granted and an appeal allowed each of said defendants, upon the giving by them
23 of a bond conditioned as required by law, and in the sum of Five Hundred Dollars.

JOHN H. COTTERAL,
Judge of the United States District Court for the Western District of Oklahoma.

Endorsed: 201. In Equity. United States of America v. Eneas J. McCurdy, County Treasurer of Osage County, Okla., and City of Pawhuska. Petition for Appeal to Supreme Court. Filed Sept. 4, 1917. Arnold C. Dolde, Clerk, by Frank T. McCoy, Deputy.

24 In the District Court of the United States for the Western District of Oklahoma.

In Equity.

No. 201.

UNITED STATES OF AMERICA, Plaintiff,

v.

ENEAS J. MCCURDY, County Treasurer of Osage County, Oklahoma, and CITY OF PAWHUSKA, Defendants.

Assignment of Errors.

And now on this 4th day of September, 1917, come the above named defendants, each by their solicitor, Preston A. Shinn, and say that the decree made and entered in the above entitled suit on the 4th day of September, 1917, against the defendants and in favor of the plaintiff, is erroneous and unjust to the defendants, and each of them, for the following reasons:

1. The Court erred in finding the issues in favor of the plaintiff.

2. The Court erred in rendering a final decree in favor of the plaintiff and against the defendants, and in holding and decreeing that lands within the corporate limits and a part of the City of Pawhuska, Oklahoma, the Indian title to which had passed, were not taxable by the State of Oklahoma and its municipal corporations, after such lands were purchased for an Osage Indian with Osage Indian funds provided for in the Act of June 28, 1906.

3. The Court erred in holding and decreeing that the plaintiff has authority under the Constitution of the United States to invest Osage Indian Moneys in lands that had been theretofore subject to taxation

by the State of Oklahoma, and thereby take such lands from without the taxing authority of said state and its municipal corporations, unless the State shall have first given its consent thereto.

4. The Court's decree violates Section 3 of Article 4, Section 4 of Article 4, of the Constitution of the United States.

5. The Court's decree violates the spirit of the Constitution of the United States, and is in direct violation of the Tenth Amendment thereto, wherein it is provided that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

6. The Court erred in enjoining the defendant from issuing the tax deed herein.

Wherefore, the defendants pray that the said decree be reversed and the District Court directed to dismiss the complaint, and that the defendants may have all other relief which to the Court may seem just and proper, the premises considered.

PRESTON A. SHINN,
Solicitor for Each of said Defendants.

Endorsed: 201. In Equity. United States of America v. Eneas J. McCurdy, County Treasurer of Osage County, Okla., and City of Pawhuska. Assignment of Errors. Filed Sept. 4, 1917. Arnold C. Dolde, Clerk, by Frank T. McCoy, Deputy.

Know All Men By These Presents:

That we, Eneas J. McCurdy and City of Pawhuska, Oklahoma, as principals, and A. N. Ruble and Chas. F. Stuart, as sureties, are held and firmly bound unto United States of America in the full and just sum of Five Hundred Dollars to be paid to the said United States of America, to which payment well and tryly to be made, we bind ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally by these presents.

Sealed with our seals, and dated this first day of September, 1917.

Whereas, lately at the Special September 1917 term of the District Court of the United States for the Western District of Oklahoma in a suit pending in said Court between United States of America, as plaintiff, and Eneas J. McCurdy, County Treasurer of Osage County, Oklahoma, and City of Pawhuska, as defendants, decree was rendered against the said Eneas J. McCurdy, County Treasurer of Osage County, Oklahoma, and City of Pawhuska, and the said Eneas J. McCurdy, County Treasurer of Osage County, Oklahoma, and City of Pawhuska, have obtained an appeal of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear in the Supreme Court of the United States at Washington, D. C., thirty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said Eneas J. McCurdy, County Treasurer of Osage County, Oklahoma, and City of Pawhuska, Oklahoma, shall prosecute said appeal to

effect, and answer all costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

ENEAS J. McCURDY. [SEAL.]
CITY OF PAWHUSKA,
By JAS. A. WEISELOGEL,
Commissioner of Public Affairs and Safety, ex-Officio Mayor.
J. M. BUCKLEY,
Commissioner of Streets.
A. N. RUBLE. [SEAL.]
CHAS. F. STUART. [SEAL.]

Sealed and Delivered in presence of
PRESTON A. SHINN.

Attest:
E. H. McMAHON,
Commissioner of Finance and Accounts, Clerk.

27 Approved, September 4th, 1917.

JOHN H. COTTERAL,
Judge of United States District Court for the Western District of Oklahoma.

Endorsed: 201. In Equity. United States of America, v. Eneas J. McCurdy, County Treasurer of Osage County, Okla., and City of Pawhuska. Bond on Appeal. Filed Sept. 4, 1917. Arnold C. Dolde, Clerk, by Frank T. McCoy, Deputy.

28 In the District Court of the United States for the Western District of Oklahoma.

In Equity.

No. 201.

UNITED STATES OF AMERICA, Plaintiff,

v.

ENEAS J. McCURDY, County Treasurer of Osage County, Oklahoma, and CITY OF PAWHUSKA, Defendants.

United States of America and John A. Fain, Its Attorney of Record:

In the above entitled cause, the appellants hereby gives notice of their election to take and file the transcript of the record herein in the Supreme Court of the United States, to be printed under the supervision of its clerk and under its rules.

And the said appellants hereby designate the following parts and

instruments of the record in said cause, to be included in said transcript:

1. Complaint, except exhibit.
2. Order allowing City of Pawhuska to intervene.
3. Amended Answer of Lee Hopkins.
4. Amended Answer of City of Pawhuska.
5. Agreed Statement of Fact, filed Sept. 4, 1917.
6. Judgment and Decree.
7. All papers filed after decree rendered looking towards an appeal.

ENEAS J. McCURDY, *Treasurer, and*
CITY OF PAWHUSKA,
By PRESTON A. SHINN, *Their Solicitor.*

I hereby accept service of the above and foregoing notice, this 4th day of September, 1917, and acknowledge receipt of a copy thereof.

REDMOND S. COLE,
Asst. United States Attorney and
Atty. of Record for the United States of America.

29 Endorsed: 201. United States of America vs. E. J. McCurdy, County Treasurer of Osage Co., Okla., et al. Notice and Election of Record on Appeal. Filed Sept. 4, 1917. Arnold C. Dolde, Clerk, by Frank T. McCoy, Deputy.

30 Department of Justice,

Office of the United States Attorney,

Western District of Oklahoma.

R. S. C.—C. E. B.: 201 E.

Enid, Sept. 7, 1917.

Arnold C. Dolde, Clerk, Guthrie, Oklahoma.

DEAR SIR: You are advised that in case No. 201 Equity, United States v. Eneas J. McCurdy, County Treasurer of Osage County, Oklahoma, the plaintiff, United States of America, does not wish to have included in the transcript of the record on appeal any instruments of record in said cause, except those requested in the præcipe of defendant.

Very truly yours,
For the United States Attorney,

REDMOND S. COLE,
Assistant United States Attorney.

Endorsed: 201. In Equity. United States vs. Eneas J. McCurdy, County Treasurer. Election by appellee as to transcript of record. Filed Sept. 8, 1917. Arnold C. Dolde, Clerk, by M. V. Haws, Deputy.

31 UNITED STATES OF AMERICA,
Western District of Oklahoma, ss:

I, Arnold C. Dolde, Clerk of the District Court of the United States for the Western District of Oklahoma, do hereby certify the foregoing to be a full, true and complete transcript of the pleadings, record and proceedings in said court in case No. 201, The United States of America, plaintiff, vs. Eneas J. McCurdy, County Treasurer of Osage County, Oklahoma, and The City of Pawhuska, Oklahoma, defendants, as full, true and complete as the said transcript purports to contain and as called for by the elections and designations of the record above set forth.

I further certify that the original citation is hereto attached and returned herewith.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at office in the City of Guthrie in said District, this 8th day of August, A. D., 1917.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk of the District Court of the United States for the Western District of Oklahoma,
By M. V. HAWS, *Deputy Clerk.*

Endorsed on cover: File No. 26,152. W. Oklahoma D. C. U. S. Term No. 685. Eneas J. McCurdy, County Treasurer of Osage County, Oklahoma, and The City of Pawhuska, appellants, vs. The United States of America. Filed September 15th, 1917. File No. 26,152.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

NO. 685.

ENEAS J. McCURDY, COUNTY TREASURER OF OSAGE COUNTY, OKLAHOMA, AND THE CITY OF PAWHUSKA,
APPELLANTS.

VS.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

MOTION TO ADVANCE.

Comes now Preston A. Shinn, appearing on behalf of the appellant, Eneas J. McCurdy, County Treasurer of Osage County, Oklahoma, ex officio collector of taxes for said County and the State of Oklahoma, and respectfully moves the court to advance the above entitled cause for hearing to a near day convenient to the court.

This suit was brought in the United States District Court for the Western District of Oklahoma, by the United States, to enjoin the appellant, County Treasurer of Osage County, Oklohoma, from issuing a tax deed to real estate within and a part of the City of Pawhuska, Oklahoma, and owned by an Osage Indian,

said real estate having been sold at a tax sale by the County Treasurer for the purpose of enforcing the collection of past due taxes thereon. The real estate was purchased by the Indian with moneys formerly held by the United States under the Act of June 28, 1906 (34 Stat. 539), alloting the Osages, and released to the use of the Indian by authority of an Act approved April 18, 1912 (37 Stat. 86, Sec. 5). The deed to the Indian containing a limitation, placed therein by the grantor at the request of the Secretary of the Interior, against alienation for a period of years, except with the consent of the Secretary of the Interior.

Relief was prayed against the County Treasurer on the ground that this real estate is not subject to taxation by the state after title acquired by an Osage Indian, same having been purchased with Osage Indian funds, and at the instance of the Secretary of the Interior. The appellants answered, that all laws relied on by the United States as giving plaintiff the right to take this real estate from the jurisdiction of Oklahoma, for the purpose of taxation, were in violation of that provision of the Constitution of the United States which provides that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people", and other sections of that Constitution.

The District Court held that this real estate is not subject to taxation by the State and its subdivisions, after title acquired by an Osage Indian, and enjoined the County Treasurer from issuing the tax deed, and

enforcing the collection of the taxes due the State thereon.

This application to advance is made by virtue of section 949 of the Federal Statutes, and because the injunction issued by the District Court interferes with the collection of the taxes due the State, and interferes with the revenue laws of the State, and the State's execution thereof, under which revenue laws the appellant, County Treasurer, receives his authority as an agent of the State to collect the revenues for the State.

This is the second injunction of this nature obtained by the United States against this County Treasurer since January 1, 1917, and the United States has brought similar suits against other County Treasurers in Oklahoma. There are a large number of City Lots in Osage County held by the same title as are the lots herein, and many thousands of dollars of Osage funds are invested in other real estate within Osage County, aside from large investments of Indian moneys in other Counties in Oklahoma. This suit is of importance, not only to Osage County and the State of Oklahoma, but to each of the States forming and constituting the United States of America. For these reasons an early determination thereof by this court is most desirable.

Respectfully submitted,

Preston A. Shinn,
Counsel for Appellants.

"Equality in right, in protection and in burden is the thought which has run through the life of this nation and its constitutional enactments from the Declaration of Independence to the present hour."

—Justice Brewer.

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CASES.

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L A W S.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

NO. 685.

ENEAS J. McCURDY, COUNTY TREASURER OF OSAGE COUNTY, OKLAHOMA, AND THE CITY OF PAWHUSKA,
APPELLANTS.

VS.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

APPELLANTS STATEMENT OF CASE.

Robert Panther, a full-blood Osage Indian, in September, 1913, purchased real estate in Block thirty-nine in the City of Pawhuska, Oklahoma, with funds provided for in the Act of June 28, 1906, allotting the Osages. (Record, page 2). The United States,

through its Indian Bureau, assisted in the transaction, and required Panther's grantor to place in the deed a clause restricting the sale of this real estate, except with the consent of the Secretary of the Interior. (Record, Page 3).

This real estate was paid for with Panther's own money, and title taken in Panther's name, and was on the tax rolls of Osage County, and subject to taxation at the time title thereto was acquired by Panther, and had been for several years prior thereto a part of the taxable real estate within the City of Pawhuska. This real estate was sold by the County treasurer of Osage County for the purpose of enforcing taxes due for the last half of the year of 1912. The United States on January 18th., 1917, tendered to the County treasurer, and to the holder of the tax certificate, the taxes due for the last half of 1912 and for 1913, the year in which Panther acquired title, (Record, pages 3, 4), but the same was refused by each party. The United States did not tender the taxes for the years of 1914, 1915, and 1916, being years when the title to this real estate was in Panther, and for this reason the County Treasurer and the bank holding the tax certificate refused to accept of the tender. (Record, page 10). The County Treasurer gave notice as required by law that on the 25th., day of January, 1917, he would issue to the holder of the tax certificate a tax deed to the Panther property.

The United States filed its Bill in the United States District Court for the Western District of Oklahoma, praying for an injunction against the County

Treasurer, restraining him from issuing the tax deed to said lots. The Court granted the temporary order. The City of Pawhuska asked, and was given, permission to intervene in said suit. (Record, page 5). The County Treasurer and the City of Pawhuska each answered the Bill of Complaint; each, alleging in substance, that the tax in question was on real estate in the City of Pawhuska, not Indian lands; that the United States and the Osages had parted with their title to said real estate, and that the same was a part of the City of Pawhuska and the State of Oklahoma; that insofar as the transaction betwen Panther, his grantor, and the United States, whereby title was vested in Panther to this real estate, was intended to take this real estate from the jurisdiction of the State of Oklahoma, and the City of Pawhuska for taxing purposes, the same was without authority of law, and void; that all laws and regulations thereunder by which the United States claimed authority to take this real estate from the jurisdiction of the State and City for the purpose of taxation were void, and in violation of the Tenth Amendment to the Constitution of the United States as well as violative of other sections of that Constitution. (Record, pages 5 to 9 both inclusive).

The suit came on for final hearing upon the Bill and Answers, the parties stipulating as to the facts. (Record, pages 10, 11). Eneas J. McCurdy was substituted as defendant for Hopkins, he having succeeded Hopkins as County Treasurer. (Record, pages 10 and 12). The Court rendered its decree in favor of the

plaintiff, and made permanent its injunction against McCurdy, County Treasurer (Record, pages 12, 13).

The defendants each excepted to the ruling and the decree of the Court, and each gave notice of, and prayed, an appeal from said ruling and decree to the Supreme Court, this in open Court, said appeal being perfected on September 4th., 1917, the day upon which the Court rendered its decree, and upon which the same was entered. (Record, page 13). Said appeal was allowed from this Court because the defendants relied on the provisions contained in the Constitntion of the United States as a defense to the suit, and the Court passed thereon adversely to the defendants. (Record, pages 7, 9, and 12).

SPECIFICATIONS OF ERROR.

The decree of the District Court for the Western District of Oklahoma violates the Tenth Amendment to the Constitution of the United States, in that there is no authority conferred in the said Constitution whereby the United States can interfere with a state in levying and collecting a tax on real estate within the State, not the property of the United States, but that of a citizen of the state, so long as such levy and collection of the tax conforms to the "Due Process," and "Equal Protection" clauses of the Constitution.

2. The decree violates Section 3 of Article 4 of the Constitution of the United States, in that Oklahoma has the right to tax her own real estate, and to deny the state this right brings Oklahoma into "this union" on an unequal footing with the original state forming "this Union."

3. The decree violates Section 4 of Article 4 of the Constitution of the United States, in that it gives

the United States authority to destroy all form of government within the state, as the state cannot exist without its right to collect a tax on its lands.

4. The decree violates Section 4 of Article 4 of the Constitution of the United States, in that the United States is therein pledged to protect the state against invasion, the decree being a more serious invasion than that of an army.

5. The decree violates the Ninth Amendment to the Constitution of the United States, in that it denies the state the right to tax lands, not the property of the United States, which right was retained by the people.

6. The decree violates the Fifth Amendment of the Constitution of the United States, in that it takes the property of the State of Oklahoma, and the City of Pawhuska, without due process of law, and without any compensation.

7. The decree violates the Fifth Amendment to the Constitution of the United States, in that it takes the private property of the State and the City for private use.

8. The decree violates the spirit of the Constitution of the United States as enunciated in its Preamble.

RECORD ASSIGNMENT OF ERROR.

1. The Court erred in finding the issues in favor of the plaintiff.

2. The Court erred in rendering a final decree in favor of the plaintiff and against the defendants, and in holding and decreeing that lands within the corporate limits and a part of the City of Pawhuska, Okla-

homa, the Indian title to which has passed, were not taxable by the State of Oklahoma and its municipal corporations, after such lands were purchased for an Osage Indian with Osage Indian funds provided for in the Act of June 28, 1906.

3. The Court erred in holding and decreeing that the plaintiff has authority under the Constitution of the United States to invest Osage Indian Moneys in lands that had been theretofore subject to taxation by the State of Oklahoma, and thereby take such lands from without the taxing authority of said state and its municipal corporations, unless the State shall have first given its consent thereto.

4. The Court's decree violates Section 3 of Article 4, Section 4 of Article 4, of the Constitution of the United States.

5. The Court's decree violates the spirit of the Constitution of the United States ,and is in direct violation of the Tenth Amendment thereto, wherein it is pro vided that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

6. The Court erred in enjoining the defendant from issuing the tax deed herein.

Record, pages 14 and 15.

Local Taxation.

The Enabling Act for the admission of Oklahoma as a state is the compact between the United States and the State of Oklahoma.

Chap. 3335, U. S. Stat., 1905-1906, Part 1, Page 267.
Coyle v. Smith, 221 U. S. 559.

The Enabling Act for the admission of the state enumerates the classes of lands which shall not be subject to taxation by the state, public lands, and Indian lands, until the title thereto shall have been extinguished by the United States.

Enabling Act, supra, sections 1 and 3.

The enumeration of one or many classes of property, as exempt from taxation, excludes all others from the exemption.

The real estate involved herein was not Indian land, but a part of the City of Pawhuska.

Record, pages 2 and 6.
Chapter 1479, 33 Stat. 1061.

Section 5 of the Act Approved April 18, 1912, (Chap. 83, 37 Stat. 86), and all other existing laws, insofar as such law is intended to authorize the Secretary of the Intherior to take from the State of Oklahoma the right to levy and collect a tax upon real estate, the Indian title to which has been extinguished, same not being the property of the United States, was not made in pursuance of the Constitution of the Unit-

ed States, therefore, is not the Supreme Law of the land, but is void and of no effect.

Hamilton in the Federalist, essay No. 31.

"The Government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication".

Martin v. Hunter's Lessee, I Wheat. 326.
Federalist (Hamilton), essay No. 78.
United States v. Harris, 106 U. S. 636.

Speaking of "State Control of Local Taxation", Hamilton said:

"And making this concession, I affirm that (with the sole exception of duties on imports and exports) they would, under the plan of the Convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it would be a violent assumption of power, unwarranted by any article or clause of its Constitution. * * * Suppose, again, that upon the pretense of an interference with its revenues, it should undertake to abrogate a land-tax imposed by the authority of a State; would it not be equally evident, that this was an invasion of that concurrent jurisdiction in respect to this species of tax, which its constitution plainly supposes to exist in the State government? * * * * But it will not follow from this doctrine, that acts of the larger society, which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such. * * * Though a law, therefore, laying a tax for the use of the United States would be supreme in its nature, and could not legally be opposed or controlled;

yet a law for abrogating or preventing the collection of a tax laid by the authority of the State (unless upon imports and exports) would not be the supreme law of the land but a usurpation of power not granted by the Constitution".

The Federalist, essay No. 31.

When the Income tax case was before this Court for rehearing, Chief Justice Fuller, delivering the opinion of the Court said:

"In our judgment, the construction given to the Constitution by the authors of the Federalist (the five numbers contributed by Chief Justice Jay related to the danger from foreign force and influence, and to the treaty-making power) should not and cannot be disregarded".

Pollock v. Farmers Loan Co., 158 U. S. 627.

"The opinion of the Federalist has always been considered as of great authority. It is a com plete commentary on our Constitution, and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank, and the part two of its authors performed in framing the Constitution put it very much in their power to explain the views with which it was framed."

Chief Justice Marshall in Cohens v. State of Virginia, 6 Wheat. 264, Mar shall's Constitutional Opinions (Dillon) 407, 408.

Probably no essay in the Federalist is more to the point, and more emphatic, than essay number thirty-one, and Mr. Hamilton told the people when they were considering the adoption of the Constitution that the act of the plaintiff herein is "a violent assumption of power, unwarranted by any article or clause of its Constitution". He was speaking of the Constitution as a whole, as it was then being considered by the Conven-

tions, and certainly nothing has been added by way of amendment that would increase the authority of the plaintiff in this regard.

Tenth Amendment to the Constitution.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people".

Tenth Amendment.

The money invested in this real estate was Panther's and not that of the United States, and title was taken in the name of Panther.

Record, pages 2, 3 and 11.
Osage alloting Act (34 Stat., 539, sec. 4).

If the United States can purchase real estate for Panther, and take the same from without the taxing power of the State, and this without the consent of the State, then the plaintiff can purchase the entire real property within the State, and take it out of the taxing power of the State.

Concurring opinion of Justice Field in Pollock v. Farmer's Loan Co., 157 U. S., 604, 5 and 6.

It is the real estate within a State that makes the physical body called a "State". The United States can tax this real estate, but it is without authority to prevent the State from taxing same, so long as this real property is that of the State, and not the property of the United States.

Personal property belongs to the individual, and can be removed from the state, but real estate belongs primarily to, and within certain territorial boundries constitute, the state.

Congress created, and exempted from taxation, a homestead for Panther, making his surplus lands of 495 acres subject to taxation, thereby evidencing an intent to protect him in his Indian homestead, but that all other lands belonging to him should be subject to taxation.

34 Stat. 539, paragraphs 4 and 7 of sec. 2.
United States v. Board of Commissioners
216—Federal—883

If the taxing power of the State was to be lessened by the sale of this real-estate to Panther, then, there were five interested parties to the transaction,—Panther, his grantor, the United States, the State of Oklahoma, and the City of Pawhuska. The State and the City were not consulted, and did not consent.

Congressional Authority Over Indians.

Any authority Congress has over Indians, their lands or moneys, must be found in the Constitution, direct, or by necessary implication. This authority would be found in its treaty making power; its right to dispose of the territory and property of the United States; or, its authority to regulate Commerce with the Indian tribes.

There are, and can be, no treaties with the Osages covering the instant case, and the United States and the Osages have disposed of the territory in question. (Record, pages 2, 3, 6 and 11, and Osage Townsite Act 33 Stat. 1061 and 62). The "Commerce clause" does not give the authority, as the land is a part of the City

of Pawhuska, and the State of Oklahoma,—not in an Indian Reservation, and there can be no commerce in lands.

Paul v. Virginia, 8 Wall. 168, 19 Law ed. 357.
New York Life Ins. Co. v. Deer Lodge County, 231 U. S., 509, 510.

This real estate is subject to taxation by the State of Oklahoma, unless the United States, by its right of Eminent Domain, can take the home of any citizen of the United States and convey same to Panther. These Lots were not taken for a public use, but for a home for a citizen of the United States and of the State of Oklahoma.

The taking of property by the United States must be for a public use, such as for arsenals, forts, armories custom houses, navy yards, postoffices, park for public use, etc.

Wilkinson v. Leland, 2 Pet. 627;
Kold v. United States, 91 U. S., 367;
Ft. Leavenworth R. Co., v .Lowe, 114 U. S. 525;
United States v. Gettysburg Ry. Co., 160 U. S. 668.

Where the Tenth Amendment is urged in the answer against the law or authority relied upon by the United States, the Tenth Amendment should be considered as a general demurrer for the purpose of considering the entire Constitution.

United States v. Harris, 106 U. S. 636.

Taking Without Due Process.

If a case is within the letter of the Constitution it is not excepted from its meaning by showing that it

was not in the minds of those who formed and adopted it.

Dartmouth College v. Woodward, 4 Wheat 644, 645, 4 Law ed. 661;

Pollock v. Loan & Trust Co., 158 U. S. 632, 39 Law ed. 1124.

The Fifth Amendment to the Constitution provides that the life, liberty or property of any person shall not be taken other than by due process of law, and that private property shall not be taken for public use without just compensation. This Court holds that "person" as used in this Amendment applies to corporations.

Sinking Fund Cases, 99 U. S. 700;
Santa Clara County v. Southern Pac. R. Co., 118 U. S. 394, 30 Law ed. 118.

The State of Oklahoma is a govermental corporation, one that can sue and be sued, it can hold property and dispose thereof, and its charter can only be amended or repealed by the people of the State.

United States v. Fox, 94 U. S., 320; 24 Law ed. 192.
State v. Bancroft, 22 Kan. 200.

The appellant, City of Pawhuska, is a municipal corporation, whose charter can be amended or repealed only by the people of the corporation (and not by the legislature as in most states)' and in no event can its' charter be lawfully repealed by the United States.

Oklahoma Constitution, Article 18, Sections 2, 3a, and 4e, (Williams' Constitution);

Metropolitan Ry. Co., v. District of Columbia, 132 U. S. 1, 33 Law ed. 231.

"Sec. 4e. When such petition damands an amendment to a charter, the chief executive officer shall submit such amendment to the qualified electors of said municipal corporation at the next election of any officers of said corporation, and if, at said election, a majority of said electors voting thereon shall vote for such amendment, the same shall thereupon become an amendment to and a part of said charter, when approved by the Governor and filed in the same manner and form as an original charter is required by the provisions of this article to be approved and filed."

Article 18, Sec. 4e., Oklahoma Constitution (Williams).

That the Constitution may not be violated, this Court will consider of its own motion invasions thereof, though, because of carelessness, not specifically noticed in the objections taken in the record or briefs of counsel.

Pollock v. Farmers Loan Co., 157 U. S. 604, 39 ed. 827 (Justice Field);
O'Neal v. Vermont, 144 U. S. 359;
Murray v. Charleston, 96 U. S. 432.

Both the State and the City have a property right in the Panther Lots, at least for the purpose of taxation. This right of property was, by the decree herein, taken from the State and the City without due process of law, and without compensation.

Pollard's Lessee v. Hagan, 3 Howard, 212;
Ward v. Race Horse, 163 U. S. 504;
Coyle v. Smith, 221 U. S. 559, 55 Law ed.
Ward v. Smith, 221 U. S. 559, 55 Law ed. 853.;
Lane County v. Oregon, 74 U. S. 79, 19 Law ed. at 104.

The first Ten Amendments to the Constitution were adopted for the purpose of protecting the States, as well as individuals, from usurpations by the stronger government, the plaintiff herein, and for that reason if the instant case comes within the words and the spirit of the Fifth Amendment, these appellants should receive the protection thereof.

Chief Justice Marshall speaking for this Court said:

> "But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers, which the patriot statesman, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the General Government, not against those of the local governments".
>
> Barron v. Baltimore, 7 Peters 250, 8 Law ed. 675, Marshall's Constitutional Opinions (Dillon) 732.

Such works as Elliot's Debates, Thorpe's and Von Holst's Histories of the Constitution, are persuasive that the Constitution would not have received the necessary vote for its adoption, but for the fact that the friends of the proposed Constitution pledged themselves to assist in securing the necessary amendments for the protection of the states and the people.

The first Ten Amendments to the Constitution of the United States having been adopted as a specific

limitation of power and authority granted to the National Government, to curb any excess authority that might be included in the language used in the Constitution, it would follow that the authority given to the United States in the "Commerce clause" must be limited, and to that extent curbed, if it violated rights and limitations guaranteed in the Fifth and others of these amendments.

Adair v. United States, 208 U. S. 180, 52 Law ed. 445;
Gibbons v. Ogden, 9 Wheat. 1, 196;
Champion v. Ames, 188 U. S. 321.

"We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution".

Adair v. United States, 208 U. S. 180, 52 Law ed. 445.

Should the Court hold that the "Commence Clause" of the Constitution embraces the instant case, then should you not hold that it violates fundamental rights guaranteed the State and the City of Pawhuska in other sections of the Constitution?

Article IV.

Section 4 of Article 4 of the Constitution guarantees to the State of Oklahoma a Republican form of government, but if the United States can purchase the lands within the state, and turn them to citizens of the United States for homes, and by so doing take the same without the taxing power of the state, it can destroy all form of government in the state, as the state cannot live without its right to tax her lands.

Lane County v. Oregon, 74 U. S. 79;
Pollock v. Farmers' Loan Co., 157 U. S. 604, 605.

In the same section of Article 4, the state was promised protection against invasion, and this word is sufficiently broad in its meaning to include an invasion of the sovereign right of the state to levy and collect a tax on its lands, with which to feed and supply the blood that maintains its life. What greater invasion of a state can there be, than to take away a sovereign right that is the basis of all sovereignty? An army might pass through the state, destroying everything, as has happened to some of our states, but this invasion can be healed, and the state afterwards prosper. Take from a state the right to tax its lands and we will soon have one less state in these United States.

Lane County v. Oregon, 74 U. S. 79.

Section 3 of Article 4 of the Constitution provides, that new states may be admitted by the Congress into this union, and this Court has held that a new state comes into the union of states on an equal footing with the original states. The word "state" as here used signifies sovereignty, and the right of control over all real estate within the state, not the property of the United States. The act of the United States in preventing the state from exercising its sovereign right of taxation of property belonging to the state, destroys the state, and violates section 3 of Article 4.

Pollard's Lessee v. Hagan, 3 Howard, 212;
Lane County v. Oregon, 74 U. S. 79;
Coyle v. Smith, 221 U. S. 559.

Rickert Case.

The decision of this Court in the Rickert case (188 U. S. 432, 445), and those following the doctrine therein stated, is not an authority for the act of the United

States in this case. In the Rickert case the title to the lands, improvements, and moneys, was in the United States— the Congress had not disposed of its property.

Osages are Citizens.

The doctrine enunciated in United States v. Kagama, 118 U. S., 375, 385, should not apply in this case, for the reason that Panther is a citizen of the United States and of the State of Oklahoma.

The Enabling Act for the admission of Oklahoma as a state, made Panther a qualified elector for the purpose of voting for members of the Constitutional Convention; made him eligible to sit as a member of that convention; and, required that the Constitution for the state should make no distinction in civil and political rights on account of race or color.

Boyd v. Thayer, 143 U. S. 135, 186, 36 Law ed. 103.

Enabling Act, Chap. 3335, U. S., 1905-1906, Part 1, Page 267.

The Congress placed its own construction on the Enabling Act, as to the status of the Osages, in sections 24 and 25 of the act, which sections had to do with the admission of New Mexico and Arizona as a state. Sections one to twenty-two, inclusive, had to do with the admission of the present State of Oklahoma, and sections twenty-three to forty-one, inclusive, had to do with the admission of the two territories, Arizona and New Mexico. While the Indians in Oklahoma were permitted to participate in the formation of the new state, and required to be, and were, given the same civil and political rights as all other citizens, the Indians in New

Mexico and Arizona were not made eligible to participate in the formation of the new state, and the new state was permitted, by the Enabling Act, to make a distinction in civil and political rights as to "Indians not taxed".

Boyd v. Thayer, 143 U. S. 135, 186.
Enabling Act, Chap. 3335, supra.

There might have been Osage Indians living in each of the Convention districts, and Congress made it possible for every member of the Convention which drafted the organic law of the state to have been an Osage Indian.

Boyd v. Thayer, supra.

The same Congress that passed the Enabling Act for the admission of Oklahoma, and during the same month, passed an Act allotting the Osages, and provided therein that Panther should receive a patent in fee to his Indian Lands, with a restriction against alienation.

Allotment Act, 34 Stat. 539.
Libby v. Clark, 118 U. S. 250, 253, 30 Law ed. 133;
Schrimpscher v. Stockton, 183 U. S. 290, 299;
U. S. v. Paine Lumber Co., 206 U. S. 467, 473.

The same Congress that passed the Enabling Act for the admission of the state, and alloting the Osages, on May 8, 1906, amended the General Allotment Act, by the so called Burke Amendment, which law provides that any Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of that act, or "under any law or

treaty," is hereby declared to be a citizen of the United States. "And, provided further, that the provisions of this act shall extend to any Indians in the Indian Territory". The Osage Reservation had not been a part of the Indian Territory since 1890.

34 Stat. 182, chap. 2348.

In Boyd v. Thayer, supra, this Court said:

> "Admission of a State on an equal footing with the original states, in all respects whatever, involves the adoption as citizens of the United States of those whom Congress makes members of the political community, and who are recognized as such in the formation of the new State with the consent of Congress."

Many of the authorities cited and relied on by the court in the Boyd case, were those of Indian tribes made citizens by Congress through a collective naturalization.

Prior Liens.

This court will take judicial notice of the fact that in the newly created western states. the municipalities therein have issued school, electric light, water-works, road, court-house, and other bonds, which became a lien upon the real estate within that district.

> "Judicial notice may be taken of the common and ordinary way of doing business in exchanges on boards of trade throughout the country."

Nicol v. Ames, 173 U. S. 509.

> "Judicial notice will be taken by the Supreme Court of the United States of the fact that, in the territory of New Mexico and in other similar

parts of the west, cattle are required to be branded in order to identify their ownership, and that they run at large in great stretches of country, with no other means of determining their separate ownership than by the brand or marks upon them".

New Mexico v. Denver & R. G. R. Co. 203 U. S. 39, 51 Law ed. 79.

The Panther lots lost their Indian status by reason of the Act of Congress Approved March 3, 1905 (Osage Townsite Act, 33 Stat. 1060, 1061), the sale of the townsite was in January, 1906, and there was an Act of Congress Approved June 4, 1906, providing an office in which the deeds, of Panther's grantor, might be recorded. (34 Stat. 208). The City of Pawhuska afterwards undertook to incorporate and needing schools, we sold bonds and built school buildings. There has since been issued bonds for schools, water-works, electric light plant, court house, etc., all prior to the purchase of these lots by Panther. Congress has recognized some of our efforts in the following law:

" The incorporation of the city of Pawhuska, in the Osage Indian Reservation, Territory of Oklahoma, as a city of the first class; the election of the board of education thereof and the vote of school bonds authorized by the residents therein, to the amount of twenty thousand dollars, payable in fifteen years, with interest at the rate of six per centum per annum, are hereby severally ratified and confirmed, and the acts and municipal ordinances of said city heretofore

had and passed shall not be deemed invalid because of any defect in the incorporation of said city provided the same are not otherwise inconsistent with the laws of said Territory".

Deficiency Appropriation Bill, Fifty-ninth Congress, 2nd. Session, chap. 2919, Part 1, Page 1376, Approved, March 4, 1907, 11 a. m.

This act shows on its face that the bonds have not yet matured. Under the laws of Oklahoma, they become a lien on the Panther real estate prior to the time he purchased same.

Restriction Clause in Deed Void.

The limitation or so called restriction clause in the deed to Panther, insofar as it was intended to confer govermental authority upon the Secretary of the Interior, is void. The limitation is personal to Panther's grantor. He can waive it at anytime he desires. Panther's grantor by this deed makes the Secretary of the Interior his agent for the purpose of giving consent to alienation. This agency can be withdrawn at anytime by Panther's grantor.

Ordinarily in handling Indian lands the Secretary gets his authority from Congress, same to be withdrawn, and the Indian emancipated when the Congress so desires (U. S. v. Waller, decided April 9, 1917, 61 Law ed. 430, 432.). But in this instance the Secretary receives any authority he may have, from the Act of Panther's grantor, and not from the Act of Congress. If the Secretary has authority under the terms of this

deed to prevent the State of Oklahoma from taxing these lands, then his principal, Panther's grantor, having equal authority with his agent, can do like wise. Govermental authority cannot rest upon a foundation built entirely of sand, there must be some Legislative cement therein. Chief Justice Marshall, speaking for this Court, said:

> "The Government of the United States has been emphatically termed a government of laws, and not of men".
>
> Marbury v. Madison, 1 Cranch, 137, Marshall's Constitutional Opinions (Dillon), 16.

In United States v. Waller (not yet officially reported, 61 Law ed. at page 432), this Court said:

> "Before dealing with its interpretation, it is necessary to have in mind certain matters which are well-settled by the previous decisions of this court. The tribal Indians are wards of the government, and as such under its guardianship. It rests with Congress to determine the time and extent of emancipation. Conferring citizenship is not inconsistent with the continuation of such guardianship, for it has been held that even after the Indians have been made citizens, the relation of guardian and ward for some purposes may continue. On the other hand, Congress may relieve the Indians from such guardianship and control, in whole or in part, and may, if it sees fit, clothe them with full rights and responsibilities concerning their property, or give to them a partial emancipation if it thinks that course better for their protection".
>
> Citing United States v. Nice, 241 U. S. 591, 598.

If, as stated in the Waller case, Congress can emancipate the tribal Indian and his lands, then it must follow, that Panther's grantor can waive the restriction against alienation, which he placed in this deed. And if the agent can prevent the state from taxing these lands, then certainly his principal can do so to a like extent.

That the restriction or limitation in the deed has to do with the disability of the grantee herein, and can be removed at the will of the grantor, has the support of this court in Choate v. Trapp, 224 U. S. at page 678, where we find:

> "Nothing that was said in Tiger v. Western Invest. Co. 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct, Rep. 578, is opposed to the same conclusion here. For that case did not involve property rights, but related solely to the power of Congress to extend the period of the Indion's disability. The statute did not attempt to take his land or any right, member, or appurtenance thereunto belonging. It left that as it was. But, having regard to the Indian's inexperience and desiring to protect him against himself and those who might take advantage of his incapacity, Congress extended the time during which he could not sell".

If Congress could extend the time of disability, they could remove same at pleasure. So the disability of Panther created in this deed, could be instantly removed by the grantor at his pleasure.

Purchase Money Taxable.

It is not controlling in this case, but the money invested in this real estate by Panther was subject to taxation. Section 5 of the Act of April 18, 1912 (Chap. 83, 37 Stat. 86), provides for the "release" of these

trust funds which were created by the Act of June 28, 1906, allotting the Osages. It was the intention of Congress, as expressed in section 5 of the 1912 Act, to have these funds "released" direct to the competent allottee, and released to the incompetent allottee through a guardian. The regulations therein mentioned, to be prescribed by the Secretary of the Interior, were for the purpose of systematizing the withdrawal of "release" of the funds. These funds were being held by the United States under the Act of June 28, 1906, and while so held were not subject to taxation, but section 5 of the 1912 Act provides for the "release" upon application by the allottee. Section 6 of the 1912 Act provides for the partition of estates, and the removal of restrictions.

After Congress had provided for the "release" of these funds, partition of estates, and the removal of restrictions, then in Section 7 of the Act of 1912, we find:

> "That the lands allotted to members of the Osage Tribe shall not in any manner whatsoever be encumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency, or removal of restrictions on alienation; nor shall the lands or **funds** of Osage tribal members be subject to any claim against the same arising prior to grant of a certificate of competency. That no lands or moneys inherited from Osage allottes shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs: Provided, however, that inherited mon-

> eys shall be liable for funeral expenses and expenses of last illness of deceased Osage allottees to be paid upon order of the county court of Osage County, state of Oklahoma; Provided further, that nothing herein shall be construed so as to exempt any such property from liability for taxes".

The general rule is, that all moneys are subject to taxation, unless exempt by law, but Congress has no where said that these funds should not be subject to taxation, but on the other hand, the Congress has provided that the Treasury Department "release" certain of these moneys, and upon their release the Treasury Department discontinues the paying of interest thereon, as provided for in the Act of June 28, 1906. These released funds cannot be taken for debt, but in unmistakable language Congress has said that:

> "nothing herein shall be construed so as to exempt any such property from liability for taxes"

It is the state law that would subject these moneys to taxation, therefore the Congress would do nothing more than to say that they shall not be exempt from taxation.

> "7302. All property in this State, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation."
>
> "7305. Personal property, for the purpose of taxation shall be construed to include:
>
> First. All goods, chattels, moneys, credits and effects. "
>
> Revised Laws of Oklahoma, vol. 2, pages 1973, 1975.

CONCLUSION.

We do not question the authority of the United States to handle the Indians, and their lands, the title to which is in the United States or lands, the deed to which contains a limitation against alienation placed therein by authority of Congress, before title thereto has passed from the Indian. But in handling the Indians the plaintiff should not be permitted to violate the spirit of the Constitution, and trample upon the rights which the States have always had, and which they would not have waived to the United States, at the time the Constitution was framed and adopted. The authority for the act of the plaintiff in the instant case was not granted, in the opinion of Mr. Hamilton, when the Constitution was being debated and considered by the conventions; and, history informs us that Mr. Hamilton had much to do with the drafting and adoption of that instrument.

The Congressional legislation since 1887, when the general allotment act was promulgated, has all tended to the end of citizenship, and the assimulation of the Indian race into the general citizenship of the country. Not to give the Indian the advantage over his white neighbor, but to make him his equal in rights and in burdens. It is against the spirit of the American Government to say by legislation, that the property of one class of citizens shall not bear the same burdens as the property of other citizens. The spirit of the Fourteenth Amendment is to compel the States to administer the privileges and burdens of government to all alike. This Amendment is not, in words, a limitation

upon the Federal Government, but in spirit it is a limitation upon all government formed in this country as a result of the great War of the Revolution. Justice Brewer has said that, "Equality in right, in protection and in burden is the thought which has run through the life of this nation and its constitutional enactments from the Declaration of Independence to the present hour."

Every citizen of Pawhuska, and the State of Oklahoma, has the right to expect that the Panther real estate in the City of Pawhuska, shall bear its burdens of government equal with the other real estate within the state; that real estate owned by an Osage Indian in Pawhuska shall bear the burden of street paving adjacent thereto, and not shift that burden to the other real estate in that block.

The surface of the Osage Reservation was allotted under the Act of June 28, 1906, but the members of the tribe hold the mineral interest in common, and this Court will take judicial notice of the fact that Panther is an owner in common of one of the greatest oil and gas fields in the United States. The plaintiff, through its Indian Bureau advertises the Osages as the wealthiest people per capita in the world, and they are in fact. The plaintiff taxes Panther and the other Osages for the support of the United States, and every unmarried member of the tribe will have to pay an income tax to the plaintiff for the year of 1917, and every Osage married to a member of the tribe will have to pay an income tax to the plaintiff for the year of 1917. Being taxed for the support of the plaintiff, there can be no reason given why the real estate owned

by an Osage, same being a part of an incorporated city, within a state, should not be taxed for the support of the police protection rendered by the state.

We respectfully urge that the decree of the trial court is not warranted by the terms of the Constitution of the United States; that it violates the fundamental principles upon which rest all form of government in this country, and that the same should be by this court reversed.

Respectfully submitted,

Preston A. Shinn,
Attorney for Appellants.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 685.

ENEAS J. McCURDY, COUNTY TREASURER OF OSAGE COUNTY, OKLAHOMA, AND THE CITY OF PAWHUSKA, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

REPLY BRIEF OF APPELLANTS.

PRESTON A. SHINN,
Attorney for Appellants.

(26,152)

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Jurisdiction.

The appellee questions the jurisdiction of this court to hear this appeal, but says "we do not insist upon it." We have read the cases cited upon this point, and insist that they do not apply to this case.

This suit was brought by the United States against a County Treasurer, whose duty under the laws of the State is to collect the taxes due the State in his county, and enforce the payment of the tax, if necessary, by a sale of the real estate taxed, and the suit was for the purpose of enjoining the treasurer from enforcing the collection of taxes due (R., 2, 3).

Mr. Madison, in the *Federalist,* said: "The Federal and State governments are, in fact, but different agents and trustees of the people, constituted with different powers and designated for different purposes." Lane County *vs.* Oregon, 74 U. S., 79. The Federal Government having only such powers as have been delegated to it in its Constitution, the fact that it instituted this suit against the County Treasurer, an agent of the State, is a claim of its authority under its Constitution and of a lack of authority in the State; that the people had placed this authority in the United States and taken it away from the States. The County Treasurer answered, denying the validity of any statute under which the United States claimed to act in this regard, and alleged that the United States, acting by and through its agent, the Department of the Interior, was wholly without authority, and was violating its charter of authority issued to it by the people of the United States. It would seem that this case is a square-cut issue of authority. Did the people retain in their agent, the State, the authority to levy and collect a tax concurrently with the United States on the lands over which the State has jurisdiction, or did the charter of authority given to the United States take away this authority theretofore existing in it, from the State? We understand this state of facts to be such a case "that involves the construction or application of the Constitution."

> "This defendant denies that the plaintiff was acting under authority of law, as set forth in said complaint, and says that in so far as said deed to said described lands from H. H. Brenner to Robert Panther,

and each and every of said transactions mentioned in said complaint, attempts, or purports, to take said described lands from without the authority and jurisdiction of the State of Oklahoma, and its municipal corporations, as a subject-matter of taxation by said State, the same are void, and all laws or regulations under which the plaintiff assumed to act are void, and the plaintiff, its Secretary of the Interior, its Commissioner of Indian Affairs, and all other officers and agents, each and every of them, was acting without legal authority, and in violation of the spirit and the letter of the Constitution of the United States of America, and more particularly its preamble, its section 3, article 4, providing that 'new States may be admitted by the Congress into this Union;' its ninth amendment, wherein it is provided that 'the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people,' and its tenth amendment, wherein it is provided that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people' "(R., 7).

In a preceding paragraph of the answer the County Treasurer plead the fact that Oklahoma is one of the sisterhood of States constituting the United States of America, and that as such State she has the right, authority, and jurisdiction to levy and collect a tax on the real estate described in the complaint.

To carry out the objects—mentioned in the preamble to the Constitution—for which the Federal Government was created and established by the people, there was created the three great Departments of Government, the Legislative, Executive, and the Judicial. The tenth amendment to the Constitution says that the powers not delegated to these three Federal departments by the Constitution, nor prohibited by it to the States, are reserved. An invasion of this reserved power by one of these three Federal departments is just as harmful as it would be by another. The severing of an

artery of this reserved power by the Executive Department is just as painful as though the operation was performed by the Legislative Department. It will take the life of the State just as quickly. We think the people had in mind the Executive as well as the Legislative Department when they adopted the tenth amendment.

> "In the language of Chief Justice Marshall, a case 'may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either' (Cohens *vs.* Virginia, 6 Wheat., 379); or when 'the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, or sustained by the opposite construction' (Osborne *vs.* Bank of the United States, 9 *id.*, 822)."
>
> Gold-washing & Water Co. *vs.* Keyes, 96 U. S., 201.

> "A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege, or immunity is claimed under that instrument."
>
> Ansbro *vs.* United States, 159 U. S., 697.

The Constitution does not prohibit Oklahoma from levying and collecting a tax on the real estate herein, and the tenth amendment reserves that right in the State. Speaking of local taxation by the States, this court, in Lane County *vs.* Oregon, 74 U. S., 79, said:

> "There is nothing in the Constitution which contemplates or authorizes any direct abridgment of this power by national legislation. To the extent just indicated, it is as complete in the States as the like power within the limits of the Constitution is complete in Congress."

If the Department of the Interior is relying upon congressional enactment for its authority in the instant case, then the County Treasurer says the law is void. Congress not

having the authority to enact same. If, on the other hand, there is no act of Congress authorizing the position of the United States in this case, then it is an act of executive usurpation of undelegated authority, and in any event calls for the court's construction and application of the Constitution. We would call the attention of the court to the following cases, construing Code 238:

Cummings *vs.* Chicago, 188 U. S., 410.
Dimmick *vs.* Tompkins, 194 U. S., 540.
Pierce *vs.* Creecy, 210 U. S., 387.
Burton *vs.* United States, 196 U. S., 283.
Williamson *vs.* United States, 207 U. S., 425.
United States *vs.* Larkin, 208 U. S., 333.
Vicksburg *vs.* Vicksburg Waterworks Co., 202 U. S., 453.
North American Cold Storage Co. *vs.* Chicago, 211 U. S., 306.
B. Altman & Co. *vs.* United States, 224 U. S., 583, 601.
Itow *et al. vs.* United States, 233 U. S., 584.
Loeb *vs.* Columbia Township Trustees, 179 U. S., 472.
Field *vs.* Barber Asphalt Co., 194 U. S., 620.
Green *vs.* Louisville & Nashville Ry. Co., 244 U. S., 499.
Badders *vs.* United States, 240 U. S., 391.

The authority of the United States in this regard was laid before the trial court, and the court ruled "that the Federal constitutional inhibitions pleaded and urged by the defendants will not avail" (R., 12).

Instrumentality of the United States.

Counsel for the United States take the position that the purchase of the real estate in question was an instrumentality of the United States in furtherance of its Indian policy, and therefore the same is not subject to taxation, and they rely

strongly upon McCulloch *vs.* Maryland, the Rickert, and Thurston County cases, and a letter from the Secretary of the Interior. We deny that the plaintiff has the authority to create an instrumentality unless it necessarily grows out of an authority directly conferred in the Constitution.

But what is the Osage Indian policy of the United States? And will we ascertain this policy in the acts of Congress. or from the acts of that department created by Congress for the purpose of carrying out the instructions of the Congress as to the Osages? Article I, section 8, of the Constitution confers upon Congress the power to regulate commerce with the Indian tribes. The Congress has dealt with the Osages and the Five Civilized Tribes by distinct and separate legislation, and not by the general allotment act of 1887, as with the other Indian tribes. Probably because of the fact that the title held by the Osages and the Five Tribes was different from the title held by the Indians allotted under the act of 1887. The Osages bought and paid for their lands, and the title held by the United States prior to allotment was the naked legal title without any pecuniary interest whatever in the equitable title. The acts of Congress touching the Osages will indicate the policy of Congress towards the Osages, and not the act of 1887.

The court is especially interested at this time in the congressional policy of taxation with reference to the Osages. The court will construe this Osage legislation together for the purpose of ascertaining the legislative intent. The surface of the Osage lands was allotted under the act of June 28, 1906 (34 Stat., 539), the mineral interest being held in common for a period of years. Patents in fee were issued to the surface lands containing a restriction against alienation. In paragraph 4 of section 2 of that act it is provided that each member should have a homestead of 160 acres, which shall remain *inalienable* and *non-taxable* until otherwise provided by act of Congress. Each member received 495 acres of surplus lands, which the above paragraph pro-

vided "shall be inalienable for twenty-five years, except as hereinafter provided." Nothing said at this point about taxing the surplus lands, but they may be alienated as "hereinafter provided."

Thereinafter, and in paragraph 7 of section 2, the Congress provided for the issuance of certificates of competency, which permits the holder thereof to alienate any or all of his surplus lands, and—

> "*Provided,* That the surplus lands shall be nontaxable for the period of three years from the approval of this act, *except* where certificates of competency are issued or in case of the death of the allottee, unless otherwise provided by Congress."

Thus under the general act of 1887 the lands would not be subject to taxation for 25 years, or longer, if the President should decide that the United States should longer hold the legal title, while under the Osage act the lands became taxable in three years, or sooner if a certificate of competency was issued or an allottee died. These surplus lands were to be inalienable for twenty-five years, except as provided in paragraph 7, wherein it is provided for taxation, and, if necessary, forced alienation, by authority of paragraph 4 of section 2, to enforce the payment of the taxes. See United States *vs.* Board of County Commissioners (Osage County), 216 Fed. (C. C. A.), 883.

On April 18, 1912, there was approved "An act supplementary to and amendatory of the act entitled 'An act for the division of the lands and funds of the Osage Nation of Indians in Oklahoma,' approved June 28, 1906, and for other purposes" (37 Stat., 86). It is under this statute that the funds held under the act of June 28, 1906, were "released" by Congress to Panther, with which he purchased the real estate involved herein for taxation. To get the intent of Congress it will be necessary to study several sections of this act.

Section I provides:

> "That until the inherited lands of the deceased members of the Osage tribe of Indians shall be partitioned or sold the Secretary of the Interior be, and he hereby is, authorized to pay the taxes on said land out of any money due and payable to the heirs from the segregated decedent's funds in the Treasury of the United States."

We think this section has an entirely different meaning than that suggested by counsel for the United States, on page 18 of their brief, wherein we find: "Finally, the proviso does not purport to render taxable any Indian property, but only seeks to prevent a possible construction which would exempt 'inherited lands' which were made taxable by section I of the act." The seventh paragraph of section 4 of the act of June 28, 1906, had made the lands of deceased allottees taxable (216 Fed., 883), and section 1, *supra,* was for the purpose of making certain that the taxes were paid until such time as the heirs could be ascertained, a partition had, and the lands placed in charge of the individual heirs or a sale made.

Section 5 provided for the "release" of the funds to those who could meet the requirements of the Secretary of the Interior, but we contend that the law authorized the Secretary to release, if at all, in one of two ways—to the Indian direct, or, two, to a guardian under the supervision of the court.

Section 6 helps to get the intent as expressed in section 5, as well as in section 7. The sixth section provides for a partition of the lands of deceased allottees, the removal of restrictions on alienation, and then—

> "If some of the heirs are competent and others have not certificates of competency, the proceeds of such part of the sale as the competent heirs shall be entitled to shall be paid to them without the intervention of an administrator. The shares due minor heirs, including such minor Indian heirs as may not

be tribal members and those Indian heirs not having certificates of competency, shall be paid into the Treasury of the United States and placed to the credit of the Indians upon the same conditions as attach to segregated shares of the Osage national fund, or with the approval of the Secretary of the Interior paid to the duly appointed guardian. The same disposition as herein provided for with reference to the proceeds of inherited lands sold shall be made of the money in the Treasury of the United States to the credit of deceased Osage allottees."

It will be noted that this section provides that money due competent heirs, both from the sale of the lands of the deceased and moneys held in the Treasury of the United States, shall be paid direct to the heir; that the money due minors and those not having certificates of competency shall be paid into the Treasury of the United States, or with the approval of the Secretary of the Interior paid to the duly appointed guardian. The section does not authorize the Secretary to handle these funds for investments, or otherwise, than to place them in the Treasury of the United States or permit their payment to a guardian.

The act of April 18, 1912, became a law in a much different form in many respects than what was asked for. (See Report of Indian Committee, 62d Congress, 2d session, No. 230, made January 12, 1912, on S. 2.)

The act originally provided that the funds from the sale of lands mentioned in section 6 and the money in the Treasury could "be disbursed in such manner and to such extent as the Secretary of the Interior may determine" (Report No. 230, *supra*). We think section 6 is beneficial in ascertaining the intent of section 5, and that the funds "released" from the Treasury under section 5 were to be paid by the Treasury Department direct to those whom the Secretary of the Interior found proper parties to handle same, and to a guardian for all others whom the Secretary of the Interior permitted to withdraw their funds from the Treasury of the

United States; that it was not intended that these funds should be invested or supervised by the Secretary of the Interior, but paid direct to the allottee or to a guardian. These funds were already invested by the Indian, and the United States were paying five per cent thereon, and they are not subject to taxation while in the Treasury of the United States. This construction is in keeping with the act of June 28, 1906, and with section 6 of the act of 1912.

Section 7 has been discussed in our original brief, and we have discussed other sections of the act herein for the purpose of throwing more light, if possible, on section 7. In the act of June 28, 1906, Congress had made the surplus lands subject to taxation, though the Indian in many instances could not make a voluntary alienation of same. In the act of 1912, Congress, in section 5, provided for a "release" of the funds to those who cared to apply therefor, if the Secretary of the Interior could be convinced that it was for the best interest of the applicant, same to be paid direct or to a guardian. Section 6 provides for partition of estates, removal of restrictions, for the payment of funds direct to the heir, as to a certain class, and that the funds be placed in, or kept in, the Treasury of the United States, or paid to a guardian, as to the incompetent class. Then in section 7, Congress made the lands and funds of the Osages secure as against the ordinary indebtedness, but "*Provided, further,* That nothing herein shall be construed so as to exempt *any such property* from *liability* for *taxes.*"

The act of 1912 evidently must have passed the Senate before passing the House, as it was pending in the House as Senate Bill No. 2. The House amended section 7, and the committee report on page 2 has the following:

> "Page 7, line 8, afteer the word 'the' strike out the words 'Secretary of the Interior,' and insert the following: County Court of Osage County, State of Oklahoma: *Provided, further,* That nothing herein shall be construed so as to exempt any such property from liability for taxes" (Report of Indian Committee, No. 230, *supra*).

McCulloch vs. Maryland.

McCulloch *vs.* Maryland seems to be the early case upon which is based the rule of governmental instrumentality. We take it that before the rule can apply there must be some power delegated in the Constitution for the execution of which it is necessary to use this incidental authority to carry into complete effect the power granted in the Constitution. We think McCulloch *vs.* Maryland enunciates this doctrine.

Osborne *vs.* The United States Bank, 9 Wheat.

In Van Brocklin *vs.* State of Tennessee, 117 U. S., 151, this court had occasion to review what was said by Chief Justice Marshall in McCulloch *vs.* Maryland, and among other things said:

> "All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. The sovereignty of a State extends to everything which exists by its own authority or is introduced by its permission; but does not extend to those means which are employed by Congress to carry into execution *powers conferred* on that body by the people of the United States."

Again, in the Van Brocklin case the court said:

> "To guard against any misunderstanding of the scope and effect of the decision in McCulloch *vs.* Md. (*supra*), Chief Justice Marshall added: 'This opinion does not deprive the State of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State.'"

Prior to the adoption of the Constitution of the United States the State had the right to tax all the lands within its jurisdiction, and since its adoption the State has had the right to tax all real estate, not that of the United States, and

over which the National Government had parted with its title. In the McCulloch case the State of Maryland was not prohibited by the court from taxing its own property, but from taxing the property and rights of the United States, introduced into the State of Maryland for the benefit of that and all the other States. In that case the Federal Government had received direct and positive authority in the Constitution to do those things which made it necessary to maintain a banking system.

Thurston County Case.

In the Thurston County case, cited by appellee, the land sold belonged to the United States. The Congress is given authority in the Constitution to make all needful rules and regulations for the disposal of the territory and property of the United States. Because of its sovereign rights, it probably would have had this right regardless of any provision as above. Until such time as the Congress had disposed of this land of the United States, they had a right to do as they pleased with it, regardless of any State. As the title to the land was in the United States, they had a right to control the proceeds of sales. The land had never belonged to the State, but to the Government, and the State had nothing taken from its taxable property by the sale, or by the holding of the court. The State probably gained in the transaction, or selling of the lands by the United States, as there is not much doubt but that after the sales, and the transfer of title, the lands became a part of the taxable real estate of Nebraska. How different from the case at bar! In the present case the Federal Government seeks to diminish the taxable property of the State, and for a non-public purpose, and without any constitutional authority from which to extract "Instrumentalities."

Departmental Construction.

Counsel cite as authority on page 15 of their brief a letter of instructions from the Secretary of the Interior to the Commissioner of Indian Affairs. We do not have access to this letter, but feel confident that it was written covering the general act of 1887, and not as a construction of the Osage acts, as these acts do not warrant this construction. This court disposes of this letter as an authority in Interstate Commerce Com. *vs.* Ry. Co., 167 U. S., 510, in this language:

> "Still again, it is urged that the Commission has decided that it possesses this power and has acted upon such decision, and an appeal is made to the rule of cotemporaneous construction. But it would be strange if an administrative body could by any mere process of construction create for itself a power which Congress had not given to it."

Throughout the brief of appellee we find them using the word "home." If the Federal Government has the right to prevent the State from taxing any of its lands, it has the right to prevent it from taxing all of its lands. If it has the right to take the lands of the State for "homes" for Indians, it has the right to take any business property whatever. If as a matter of authority and power it can take my home for Robert Panther, then it can take the State Capitol building for the Chief of the Osages.

> "The vice of the argument is that it is building up indirectly and by implication a power which is not in terms granted." Interstate Com. Com. *vs.* Ry. Co., 167 U. S., 509.

On page 7 of answer brief we find:

> "The act of 1906 required these funds to be held in the Treasury and permitted only payment of interest to the Indians *or use of the interest for their benefit.*"

The Osages and their heirs have a vested interest in these funds. They do not belong to the Government, and never have so belonged. Section 4 of the act of 1906 is specific and mandatory:

> "And placed to the credit of the individual members of the said Osage tribe on a basis of a pro rata division among the members of said tribe, as shown by the authorized roll of membership as herein provided for, or to their heirs as hereinafter provided, said credit to draw interest as now authorized by law; and the interest that may accrue thereon *shall* be paid quarterly to the members entitled thereto, except in the case of minors, in which case the interest *shall* be paid quarterly to the parents until said minor arrives at the age of twenty-one years: *Provided,* That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment of such interest: and *provided further,* That said interest of minors whose parents are deceased shall be paid to their legal guardians, as above provided."

Prior to April 18, 1912, if the funds of a minor were being misused or squandered, the Commissioner of Indian Affairs could withhold same, but he could only pay same to the parents. Section 3 of the 1912 act provides for the appointment of a guardian for a minor whose parents are squandering the funds of the minor.

United States vs. Nice.

We think what has been heretofore set forth in our briefs proves conclusively that our position is not contrary to the rule announced by this court in United States *vs.* Nice, 241 U. S., 591, and in the more recent case of United States *vs.* Waller, — U. S., —. We are familiar with the rule that as to the Indian and his Indian property, the Congress is supreme.

> "Before dealing with its interpretation, it is necessary to have in mind certain matters which are well settled by the previous decisions of this court. The

> tribal Indians are wards of the Government, and as such under its guardianship. It rests with *Congress* to determine the time and extent of emancipation. Conferring citizenship is not inconsistent with the continuation of such guardianship, for it has been held that even after the Indians have been made citizens, the relation of guardian and ward for *some purposes* may continue. On the other hand, *Congress may* relieve the Indians from such guardianship and control, in whole or in part, and may, if it sees fit, clothe them with full rights and responsibilities concerning their property, or give to them a partial emancipation if it thinks that course better for their protection."
>
> Waller case, citing United States *vs.* Nice.

We take it that "Property" as used in the excerpt above, refers to their Indian property—property which the Indian receives from the Federal Government, and over which the Federal Government has jurisdiction. Not the property under the jurisdiction of the State (Choate *vs.* Trapp, 224 U. S., 674, 678, citing Jones *vs.* Meehan, 175 U. S., 1). Certainly the conferring of citizenship is an evidence of the Congressional intent to emancipate the Indian. The conferring of citizenship upon the Indian throws around him a cloak of rights and burdens which he had not before possessed. Being once a citizen of the United States he is declared by the Fourteenth Amendment to be a citizen of the State in which he resides, and as such owes some duties to the State as well as the Federal Government, and under that amendment the State owes to the Indian, its citizen, a certain protection.

> "All persons within the jurisdiction of the United States shall have the same rights in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and *shall* be subject to like punishment, pains, penalties, *taxes,* licenses, and to no other" (Sec. I, of Civil Rights Act).

This court, in Geofroy *vs.* Riggs, 133 U. S., 266, speaking of the treaty-making power, said:

> "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the Government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the *character* of the Government, or in *that of one of the States*, or a *cession of any portion of the territory of the latter* without its consent."

We think this opinion is equally in point as to the commerce clause of the Constitution (Adair *vs.* United States, 208 U. S., 180).

Why the Congress has been more liberal with the Osages than with the Indians allotted under the general act of 1887 may be explained by the report of the Senate Committee on Indian Affairs:

> "The Osages are the richest people in the world, and there is no reason why they should not pay their taxes on lands which are subject to alienation as proposed" (Report No. 230, *supra*, containing a former report by Senate Committee, page 4).

The Congress has made the Osages citizens; the Treasury Department has held them liable on their incomes, from Indian property, for the Federal income tax, which they are paying; the War Department holds them subject to the military draft to fight for *their* country, and many of them have answered the call, some having died in this service. We think Congress has shown its intent of emancipation, and that Robert Panther should pay the tax on the property which he owns under license from the State.

Respectfully submitted,

PRESTON A. SHINN,
For Appellants.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

ENEAS J. McCURDY, County Treasurer of Osage County, Oklahoma, and the CITY OF PAWHUSKA, Appellants,
v.
THE UNITED STATES.
No. 685.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The appeal in this case (R. 13–14) is directly to this court from a decree of the District Court for the Western District of Oklahoma (R. 12) enjoining the County Treasurer of Osage County, Oklahoma, from issuing a tax sale deed for a town lot in Pawhuska belonging to Robert Panther, an Osage Indian.

The following facts were stipulated (R. 10):

Panther is an incompetent member of the Osage Indian Tribe. The lot was purchased under authority and direction of the Secretary of the Interior with money segregated and placed to the credit of Panther by authority of the Osage Allotment Act of June 28,

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1906 (34 Stat. 539). Title was taken in the name of Panther and the deed, dated September 13, 1913, contained the following clause:

> This conveyance is made and accepted with the understanding, and under the condition that the above described property is to be and remain inalienable and not subject to transfer, sale or incumbrance for a period of eighteen years from the 1st day of July, 1913, except by and with the express consent and approval of the Secretary of the Interior, or his successor in office.

At the time of this purchase and conveyance the lot was subject to taxation under the laws of Oklahoma and the issue was as to the validity of a sale for delinquent taxes levied thereafter for the years 1914, 1915, and 1916 (R. 11).

The District Court ruled, as shown by the decree (R. 12):

> That the restriction clause contained in said deed therefor to Robert Panther requiring the consent of the Secretary of the Interior before Robert Panther could sell said lands, was in furtherance of the policy of the United States of America in dealing with the Osage Indians; that the trust character impressed on these purchase moneys by the said Act of June 28, 1906, followed them into the said real property purchased therewith, in accordance with the provisions of the restriction clause contained in said deed of conveyance to Robert Panther, and while so held constitutes an instrumentality lawfully employed

> by the Government for the protection of said Indian, and effectively withdrew said real property from subsequent taxation by the State of Oklahoma and its subdivisions.

Jurisdiction of this Court.

The right of direct appeal from the District Court in this case depends upon whether it "involves the construction or application of the Constitution of the United States." Judicial Code, § 238.

The answer asserted (R. 7) that the Secretary of the Interior was without authority to withdraw the property from State taxation and that his attempt to do so was—

> in violation of the spirit and the letter of the Constitution of the United States of America, and more particularly its preamble, its section 3, article 4, providing that "New States may be admitted by the Congress into this Union," its ninth amendment, wherein it is provided that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," and its tenth amendment, wherein it is provided that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The mere assertion of obviously inapplicable provisions of the Constitution does not raise a real and substantial issue involving its construction or application. The only real questions in this case are as to the authority of the Secretary of the Interior to

invest the trust funds of an incompetent Osage Indian in real property, and as to the taxability of such property, under acts of Congress passed in the exercise of undoubted constitutional authority. It is difficult to see how the determination of such questions can require a construction or application of any provision of the Constitution in order to give this court jurisdiction upon a direct appeal from the District Court. *American Sugar Refining Co.* v. *United States*, 211 U. S. 155, 161–162; *Sloan* v. *United States*, 193 U. S. 614, 620; *Spreckles Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 407; *Merritt* v. *Bowdoin College*, 169 U. S. 551, 556.

The Questions Submitted.

If the jurisdictional objection can be got over—and we do not insist upon it—we maintain, in opposition to the points made in behalf of the appellant: (1) That the Secretary of the Interior had authority to purchase the lot for Panther and impose the restriction on its alienation and incumbrance; and (2) that the lot so purchased and restricted was an instrumentality of the United States and therefore not taxable under state laws.

ARGUMENT.

I.

The Secretary of the Interior had Authority to Purchase the Lot for Panther and Impose the Restriction on its Alienation and Incumbrance.

The Osage Allotment Act of June 28, 1906 (34 Stat. 539, 544), provided in section 4:

> That all funds belonging to the Osage tribe, and all moneys due, and all moneys that may become due, or may hereafter be found to be due the said Osage tribe of Indians, shall be held in trust by the United States for the period of twenty-five years from and after the first day of January, nineteen hundred and seven, except as herein provided.
>
> First. That all the funds of the Osage tribe of Indians, and all the moneys now due or that may hereafter be found to be due to the said Osage tribe of Indians, and all moneys that may be received from the sale of their lands in Kansas under existing laws, and all moneys found to be due to said Osage tribe of Indians on claims against the United States, after all proper expenses are paid, shall be segregated as soon after January first, nineteen hundred and seven, as is practicable and placed to the credit of the individual members of the said Osage tribe on a basis of a pro rata division among the members of said tribe, as shown by the authorized roll of membership as herein provided for, or to their heirs as hereinafter provided, said credit to draw interest as now authorized by law; and the in-

> terest that may accrue thereon shall be paid quarterly to the members entitled thereto, except in the case of miners, in which case the interest shall be paid quarterly to the parents until said minor arrives at the age of twenty-one years: *Provided*, That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment of such interest: *And provided further*, That said interest of minors whose parents are deceased shall be paid to their legal guardians, as above provided.

To enable the Secretary of the Interior to deal with the separate funds of individual Indians established under the Act of 1906, it was provided by the Act of April 18, 1912, c. 83, § 5 (37 Stat. 86, 87):

> That the Secretary of the Interior, in his discretion, hereby is authorized, under rules and regulations to be prescribed by him and upon application therefor, to pay to Osage allottees, including the blind, insane, crippled, aged, or helpless, all or part of the funds in the Treasury of the United States to their individual credit: *Provided*, That he shall be first satisfied of the competency of the allottee or that the release of said individual trust funds would be to the manifest best interests and welfare of the allottee: *Provided further*, That no trust funds of a minor or a person above mentioned who is incompetent shall be released and paid over except to a guardian of such person duly appointed by the proper court and after the filing by such guardian

> and approval by the court of a sufficient bond conditioned to faithfully administer the funds released and the avails thereof.

This provision gives the Secretary discretionary power to release and pay over all individual trust funds held to the credit of Osage allottees. In case he is "first satisfied of the competency of the allottee," payment may be made to the allottee. In the case of a minor or other incompetent, the fund can not be "released and paid over" except to a proper guardian. The Act of 1906 required these funds to be held in the Treasury and permitted only payment of interest to the Indians or use of the interest for their benefit. The Act of 1912 clearly contemplates a disposition of the principal funds for the Indians' benefit and advancement. To forward this purpose, full discretionary power is vested in the Secretary, and the funds are required to be "released and paid over" in every case "under rules and regulations to be prescribed by him."

Regulations to carry these provisions into effect were approved by the Secretary June 26, 1912, and are printed in full as an appendix to this brief. Provision was made for dealing with each case after investigation as follows:

> Payment in full or in part of any application under section 5 is entirely discretionary with the Secretary of the Interior, under rules and regulations prescribed by him. The facts in each case will be investigated and reported

> upon by Government officers, and the services of any person in the capacity of attorney or agent are entirely unnecessary.

The regulations then divide the Indian beneficiaries into three classes: (1) "Competent Indians"; (2) "Adults neither aged, physically disabled, nor incompetent to a degree requiring legal guardianship," and (3) "Blind, insane, crippled, aged, or helpless." With reference to class 2, provision was made for release of the fund and its expenditure under supervision as follows:

> The applicant (unless an absentee) must make his request in person to the superintendent or one of his representatives, giving the reason why it is made and agreeing to abide by a stipulation in the claim that the money is to be deposited in bank to his credit and expended under the supervision of the superintendent, subject to instructions from the Indian Office, if the Secretary of the Interior so directs.
>
> His statement will be incorporated in the superintendent's report on his application, which application will contain the stipulation referred to.
>
> The superintendent will show in his report whether it would be for the best interests and welfare of the allottee to approve an application for all or any part of his trust funds.

Pursuant to these regulations a portion of the fund placed to the credit of Panther was released and paid for the town lot in Pawhuska to provide a home for him with a restriction against alienation and in-

cumbrance without approval by the Secretary (Stipulation, R. 11). The report of the Indian Superintendent, approved by the Commissioner of Indian Affairs, showing a compliance with the regulations, is also printed in the appendix.

The power of the Secretary to release from the absolute trust and pay over these individual funds, in his discretion and under regulations to be prescribed by him, implies the power to subject such release and payment to appropriate conditions. *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 244 U. S. 351, 358; *United States* v. *Thurston County*, 143 Fed. 287, 291; *National Bank of Commerce* v. *Anderson*, 147 Fed. 87, 89. The primary object being, as in all cases of dealing with dependent Indians, to advance them on the road to useful citizenship, the condition imposed in this case—that of investment in restricted land—was manifestly appropriate. Partial emancipation from the Federal guardianship, accompanied by restricted ownership of land for a limited period, as a method of educating and preparing the Indians for the duties of civilized life, was adopted by Congress at an early date and has become a settled national policy. As the Secretary well said on January 2, 1914, in his Instructions to the Commissioner of Indian Affairs respecting this very matter (43 L. D. 26, 29):

> The Indian continues in the incompetent class and is entitled to the same protection and supervision. All these conditions are imposed on the theory that they are for the

> best interests of the Indian wards of the Government, among other things to protect them from the improvident disposition of the lands and funds.

The trust under which the fund was held extended to January 1, 1932 (34 Stat. 539, 544, §§ 4, 5), and the period of restriction imposed on the land in which the fund was invested extended to July 1, 1931 (R. 11).

Regulations thus authorized and appropriate have all the force of statutory enactments. *United States* v. *Morehead*, 243 U. S. 607, 614; *United States* v. *Eaton*, 144 U. S. 677, 688; *United States* v. *Thurston County*, 143 Fed. 287, 291. The case is therefore precisely as if Congress had in terms provided that trust funds held for incompetent Indians should be used to purchase homes for them which could not be sold or incumbered for a stated period without approval by the Secretary of the Interior. The constitutional power of Congress so to provide for dependent Indians is not open to question. *United States* v. *Rickert*, 188 U. S. 432, 443; *Tiger* v. *Western Inv. Co.*, 221 U. S. 286, 311–314; *Heckman* v. *United States*, 224 U. S. 413, 437; *Levindale Lead Co.* v. *Coleman*, 241 U. S. 432, 437.

II.

The Lot Purchased with Trust Funds and Restricted as to Alienation and Incumbrance is an Instrumentality of the United States and Therefore Not Taxable by the State.

The power of the State to tax this property can not be admitted without subordinating the Federal

power of protection over dependent Indians to the will of the State. Since *McCulloch* v. *Maryland*, 4 Wheat. 316, it has been settled that no appropriate instrument for carrying into effect the powers committed to the General Government is subject to State taxation. In that case Chief Justice Marshall said (p. 431):

> That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.

And again (p. 433):

> The question is, in truth, a question of supremacy; and if the right of the States to tax the means employed by the General Government be conceded, the declaration that the Constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.

This principle has never been departed from, and has often been reasserted and applied. *Farmers Bank* v. *Minnesota*, 232 U. S. 516, 521; *Choctaw & Gulf R. R.* v. *Harrison*, 235 U. S. 292, 298; *Indian Oil Co.* v. *Oklahoma*, 240 U. S. 522, 529. In *United States* v. *Rickert*, 188 U. S. 432, it was decided that trust allotments and personal property issued to Indian allottees could not be taxed by a State be-

cause this would be "to tax an instrumentality employed by the United States for the benefit and control of this dependent race" (p. 437), and because, if this could be done, "then the obligations which the Government has assumed in reference to these Indians may be entirely defeated" (p. 438).

In *United States* v. *Thurston County*, 143 Fed. 287, the Government sued to enjoin the collection of taxes assessed against the proceeds of the sales of inherited Indian lands which had been deposited in bank by order of the Secretary of the Interior. The lands which had been sold were subject to restrictions upon alienation, and the sales were permitted by the Act of May 27, 1902 (32 Stat. 245, 275), "subject to the approval of the Secretary of the Interior." The Secretary, under regulations prescribed by him, conditioned his approval upon a deposit of the proceeds in the bank to the credit of the Indian and subject to disbursement for his benefit only on checks approved by the proper officials of the Indian Bureau. The Circuit Court of Appeals for the Eighth Circuit decided that the funds so deposited were not taxable, and said (pp. 291–292):

> By rules and regulations approved October 4, 1902, and amended September 16, 1904, and May 25, 1905, the Secretary provided that owners of inherited Indian lands might be permitted to sell them on condition that they agreed that the proceeds of such lands should be placed in one or more banks, which should furnish satisfactory bonds to guaranty

the safety of the deposits, to the credit of each heir in proper proportion, subject to the checks of such heirs only when approved by the agent or officer in charge for amounts not exceeding $10 to each in any one month, and subject to their checks for larger amounts only when approved by the agent specifically authorized by the Commissioner of Indian Affairs. The acts of Congress authorized the Secretary to make these regulations for the purpose of carrying into effect the Act of 1902, and, when made, they had the force of statutory enactments. Rev. Stat. §§ 441, 465 [U. S. Comp. St. 1901, pp. 252, 264]; U. S. v. Eaton, 144 U. S. 688, 12 Sup. Ct. 764, 36 L. Ed. 391; Wilkins v. U. S., 96 Fed. 837, 37 C. C. A. 588. The Indians whose rights are under consideration made the sales of their lands subject to the conditions prescribed by these rules. The bank and a surety executed a bond in the sum of $50,000 to the United States, conditioned that it would pay the rate of interest upon the proceeds of the sales of these lands deposited with it which should be agreed upon by it and the Commissioner of Indian Affairs, and that it would pay over the deposits in the manner provided in the regulations of the Secretary of the Interior to which reference has been made. The proceeds of these sales were deposited with this bank under this bond and under these rules. These facts, the statutes, and the principles of equity jurisprudence which have been considered, have led our minds to these conclusions:

The Osages and their heirs have a vested interest in these funds. They do not belong to the Government, and never have so belonged. Section 4 of the act of 1906 is specific and mandatory:

> "And placed to the credit of the individual members of the said Osage tribe on a basis of a pro rata division among the members of said tribe, as shown by the authorized roll of membership as herein provided for, or to their heirs as hereinafter provided, said credit to draw interest as now authorized by law; and the interest that may accrue thereon *shall* be paid quarterly to the members entitled thereto, except in the case of minors, in which case the interest *shall* be paid quarterly to the parents until said minor arrives at the age of twenty-one years: *Provided*, That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment of such interest: and *provided further*, That said interest of minors whose parents are deceased shall be paid to their legal guardians, as above provided."

Prior to April 18, 1912, if the funds of a minor were being misused or squandered, the Commissioner of Indian Affairs could withhold same, but he could only pay same to the parents. Section 3 of the 1912 act provides for the appointment of a guardian for a minor whose parents are squandering the funds of the minor.

United States vs. Nice.

We think what has been heretofore set forth in our briefs proves conclusively that our position is not contrary to the rule announced by this court in United States *vs.* Nice, 241 U. S., 591, and in the more recent case of United States *vs.* Waller, — U. S., —. We are familiar with the rule that as to the Indian and his Indian property, the Congress is supreme.

> "Before dealing with its interpretation, it is necessary to have in mind certain matters which are well settled by the previous decisions of this court. The

> tribal Indians are wards of the Government, and as such under its guardianship. It rests with *Congress* to determine the time and extent of emancipation. Conferring citizenship is not inconsistent with the continuation of such guardianship, for it has been held that even after the Indians have been made citizens, the relation of guardian and ward for *some purposes* may continue. On the other hand, *Congress may* relieve the Indians from such guardianship and control, in whole or in part, and may, if it sees fit, clothe them with full rights and responsibilities concerning their property, or give to them a partial emancipation if it thinks that course better for their protection."
>
> Waller case, citing United States *vs.* Nice.

We take it that "Property" as used in the excerpt above, refers to their Indian property—property which the Indian receives from the Federal Government, and over which the Federal Government has jurisdiction. Not the property under the jurisdiction of the State (Choate *vs.* Trapp, 224 U. S., 674, 678, citing Jones *vs.* Meehan, 175 U. S., 1). Certainly the conferring of citizenship is an evidence of the Congressional intent to emancipate the Indian. The conferring of citizenship upon the Indian throws around him a cloak of rights and burdens which he had not before possessed. Being once a citizen of the United States he is declared by the Fourteenth Amendment to be a citizen of the State in which he resides, and as such owes some duties to the State as well as the Federal Government, and under that amendment the State owes to the Indian, its citizen, a certain protection.

> "All persons within the jurisdiction of the United States shall have the same rights in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and *shall* be subject to like punishment, pains, penalties, *taxes*, licenses, and to no other" (Sec. I, of Civil Rights Act).

This court, in Geofroy *vs.* Riggs, 133 U. S., 266, speaking of the treaty-making power, said:

> "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the Government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the *character* of the Government, or in *that of one of the States*, or a *cession of any portion of the territory of the latter* without its consent."

We think this opinion is equally in point as to the commerce clause of the Constitution (Adair *vs.* United States, 208 U. S., 180).

Why the Congress has been more liberal with the Osages than with the Indians allotted under the general act of 1887 may be explained by the report of the Senate Committee on Indian Affairs:

> "The Osages are the richest people in the world, and there is no reason why they should not pay their taxes on lands which are subject to alienation as proposed" (Report No. 230, *supra*, containing a former report by Senate Committee, page 4).

The Congress has made the Osages citizens; the Treasury Department has held them liable on their incomes, from Indian property, for the Federal income tax, which they are paying; the War Department holds them subject to the military draft to fight for *their* country, and many of them have answered the call, some having died in this service. We think Congress has shown its intent of emancipation, and that Robert Panther should pay the tax on the property which he owns under license from the State.

Respectfully submitted,

PRESTON A. SHINN,
For Appellants.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

ENEAS J. McCURDY, County Treasurer of Osage County, Oklahoma, and the CITY OF PAWHUSKA, Appellants,
v.
THE UNITED STATES.
No. 685.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The appeal in this case (R. 13–14) is directly to this court from a decree of the District Court for the Western District of Oklahoma (R. 12) enjoining the County Treasurer of Osage County, Oklahoma, from issuing a tax sale deed for a town lot in Pawhuska belonging to Robert Panther, an Osage Indian.

The following facts were stipulated (R. 10):

Panther is an incompetent member of the Osage Indian Tribe. The lot was purchased under authority and direction of the Secretary of the Interior with money segregated and placed to the credit of Panther by authority of the Osage Allotment Act of June 28,

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1906 (34 Stat. 539). Title was taken in the name of Panther and the deed, dated September 13, 1913, contained the following clause:

> This conveyance is made and accepted with the understanding, and under the condition that the above described property is to be and remain inalienable and not subject to transfer, sale or incumbrance for a period of eighteen years from the 1st day of July, 1913, except by and with the express consent and approval of the Secretary of the Interior, or his successor in office.

At the time of this purchase and conveyance the lot was subject to taxation under the laws of Oklahoma and the issue was as to the validity of a sale for delinquent taxes levied thereafter for the years 1914, 1915, and 1916 (R. 11).

The District Court ruled, as shown by the decree (R. 12):

> That the restriction clause contained in said deed therefor to Robert Panther requiring the consent of the Secretary of the Interior before Robert Panther could sell said lands, was in furtherance of the policy of the United States of America in dealing with the Osage Indians; that the trust character impressed on these purchase moneys by the said Act of June 28, 1906, followed them into the said real property purchased therewith, in accordance with the provisions of the restriction clause contained in said deed of conveyance to Robert Panther, and while so held constitutes an instrumentality lawfully employed

> by the Government for the protection of said Indian, and effectively withdrew said real property from subsequent taxation by the State of Oklahoma and its subdivisions.

Jurisdiction of this Court.

The right of direct appeal from the District Court in this case depends upon whether it "involves the construction or application of the Constitution of the United States." Judicial Code, § 238.

The answer asserted (R. 7) that the Secretary of the Interior was without authority to withdraw the property from State taxation and that his attempt to do so was—

> in violation of the spirit and the letter of the Constitution of the United States of America, and more particularly its preamble, its section 3, article 4, providing that "New States may be admitted by the Congress into this Union," its ninth amendment, wherein it is provided that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," and its tenth amendment, wherein it is provided that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The mere assertion of obviously inapplicable provisions of the Constitution does not raise a real and substantial issue involving its construction or application. The only real questions in this case are as to the authority of the Secretary of the Interior to

invest the trust funds of an incompetent Osage Indian in real property, and as to the taxability of such property, under acts of Congress passed in the exercise of undoubted constitutional authority. It is difficult to see how the determination of such questions can require a construction or application of any provision of the Constitution in order to give this court jurisdiction upon a direct appeal from the District Court. *American Sugar Refining Co.* v. *United States*, 211 U. S. 155, 161–162; *Sloan* v. *United States*, 193 U. S. 614, 620; *Spreckles Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 407; *Merritt* v. *Bowdoin College*, 169 U. S. 551, 556.

The Questions Submitted.

If the jurisdictional objection can be got over—and we do not insist upon it—we maintain, in opposition to the points made in behalf of the appellant: (1) That the Secretary of the Interior had authority to purchase the lot for Panther and impose the restriction on its alienation and incumbrance; and (2) that the lot so purchased and restricted was an instrumentality of the United States and therefore not taxable under state laws.

ARGUMENT.

I.

The Secretary of the Interior had Authority to Purchase the Lot for Panther and Impose the Restriction on its Alienation and Incumbrance.

The Osage Allotment Act of June 28, 1906 (34 Stat. 539, 544), provided in section 4:

> That all funds belonging to the Osage tribe, and all moneys due, and all moneys that may become due, or may hereafter be found to be due the said Osage tribe of Indians, shall be held in trust by the United States for the period of twenty-five years from and after the first day of January, nineteen hundred and seven, except as herein provided.
>
> First. That all the funds of the Osage tribe of Indians, and all the moneys now due or that may hereafter be found to be due to the said Osage tribe of Indians, and all moneys that may be received from the sale of their lands in Kansas under existing laws, and all moneys found to be due to said Osage tribe of Indians on claims against the United States, after all proper expenses are paid, shall be segregated as soon after January first, nineteen hundred and seven, as is practicable and placed to the credit of the individual members of the said Osage tribe on a basis of a pro rata division among the members of said tribe, as shown by the authorized roll of membership as herein provided for, or to their heirs as hereinafter provided, said credit to draw interest as now authorized by law; and the in-

> terest that may accrue thereon shall be paid quarterly to the members entitled thereto, except in the case of miners, in which case the interest shall be paid quarterly to the parents until said minor arrives at the age of twenty-one years: *Provided*, That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment of such interest: *And provided further*, That said interest of minors whose parents are deceased shall be paid to their legal guardians, as above provided.

To enable the Secretary of the Interior to deal with the separate funds of individual Indians established under the Act of 1906, it was provided by the Act of April 18, 1912, c. 83, § 5 (37 Stat. 86, 87):

> That the Secretary of the Interior, in his discretion, hereby is authorized, under rules and regulations to be prescribed by him and upon application therefor, to pay to Osage allottees, including the blind, insane, crippled, aged, or helpless, all or part of the funds in the Treasury of the United States to their individual credit: *Provided*, That he shall be first satisfied of the competency of the allottee or that the release of said individual trust funds would be to the manifest best interests and welfare of the allottee: *Provided further*, That no trust funds of a minor or a person above mentioned who is incompetent shall be released and paid over except to a guardian of such person duly appointed by the proper court and after the filing by such guardian

> and approval by the court of a sufficient bond conditioned to faithfully administer the funds released and the avails thereof.

This provision gives the Secretary discretionary power to release and pay over all individual trust funds held to the credit of Osage allottees. In case he is "first satisfied of the competency of the allottee," payment may be made to the allottee. In the case of a minor or other incompetent, the fund can not be "released and paid over" except to a proper guardian. The Act of 1906 required these funds to be held in the Treasury and permitted only payment of interest to the Indians or use of the interest for their benefit. The Act of 1912 clearly contemplates a disposition of the principal funds for the Indians' benefit and advancement. To forward this purpose, full discretionary power is vested in the Secretary, and the funds are required to be "released and paid over" in every case "under rules and regulations to be prescribed by him."

Regulations to carry these provisions into effect were approved by the Secretary June 26, 1912, and are printed in full as an appendix to this brief. Provision was made for dealing with each case after investigation as follows:

> Payment in full or in part of any application under section 5 is entirely discretionary with the Secretary of the Interior, under rules and regulations prescribed by him. The facts in each case will be investigated and reported

> upon by Government officers, and the services of any person in the capacity of attorney or agent are entirely unnecessary.

The regulations then divide the Indian beneficiaries into three classes: (1) "Competent Indians"; (2) "Adults neither aged, physically disabled, nor incompetent to a degree requiring legal guardianship," and (3) "Blind, insane, crippled, aged, or helpless." With reference to class 2, provision was made for release of the fund and its expenditure under supervision as follows:

> The applicant (unless an absentee) must make his request in person to the superintendent or one of his representatives, giving the reason why it is made and agreeing to abide by a stipulation in the claim that the money is to be deposited in bank to his credit and expended under the supervision of the superintendent, subject to instructions from the Indian Office, if the Secretary of the Interior so directs.
>
> His statement will be incorporated in the superintendent's report on his application, which application will contain the stipulation referred to.
>
> The superintendent will show in his report whether it would be for the best interests and welfare of the allottee to approve an application for all or any part of his trust funds.

Pursuant to these regulations a portion of the fund placed to the credit of Panther was released and paid for the town lot in Pawhuska to provide a home for him with a restriction against alienation and in-

cumbrance without approval by the Secretary (Stipulation, R. 11). The report of the Indian Superintendent, approved by the Commissioner of Indian Affairs, showing a compliance with the regulations, is also printed in the appendix.

The power of the Secretary to release from the absolute trust and pay over these individual funds, in his discretion and under regulations to be prescribed by him, implies the power to subject such release and payment to appropriate conditions. *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 244 U. S. 351, 358; *United States* v. *Thurston County*, 143 Fed. 287, 291; *National Bank of Commerce* v. *Anderson*, 147 Fed. 87, 89. The primary object being, as in all cases of dealing with dependent Indians, to advance them on the road to useful citizenship, the condition imposed in this case—that of investment in restricted land—was manifestly appropriate. Partial emancipation from the Federal guardianship, accompanied by restricted ownership of land for a limited period, as a method of educating and preparing the Indians for the duties of civilized life, was adopted by Congress at an early date and has become a settled national policy. As the Secretary well said on January 2, 1914, in his Instructions to the Commissioner of Indian Affairs respecting this very matter (43 L. D. 26, 29):

> The Indian continues in the incompetent class and is entitled to the same protection and supervision. All these conditions are imposed on the theory that they are for the

best interests of the Indian wards of the Government, among other things to protect them from the improvident disposition of the lands and funds.

The trust under which the fund was held extended to January 1, 1932 (34 Stat. 539, 544, §§ 4, 5), and the period of restriction imposed on the land in which the fund was invested extended to July 1, 1931 (R. 11).

Regulations thus authorized and appropriate have all the force of statutory enactments. *United States* v. *Morehead*, 243 U. S. 607, 614; *United States* v. *Eaton*, 144 U. S. 677, 688; *United States* v. *Thurston County*, 143 Fed. 287, 291. The case is therefore precisely as if Congress had in terms provided that trust funds held for incompetent Indians should be used to purchase homes for them which could not be sold or incumbered for a stated period without approval by the Secretary of the Interior. The constitutional power of Congress so to provide for dependent Indians is not open to question. *United States* v. *Rickert*, 188 U. S. 432, 443; *Tiger* v. *Western Inv. Co.*, 221 U. S. 286, 311–314; *Heckman* v. *United States*, 224 U. S. 413, 437; *Levindale Lead Co.* v. *Coleman*, 241 U. S. 432, 437.

II.

The Lot Purchased with Trust Funds and Restricted as to Alienation and Incumbrance is an Instrumentality of the United States and Therefore Not Taxable by the State.

The power of the State to tax this property can not be admitted without subordinating the Federal

power of protection over dependent Indians to the will of the State. Since *McCulloch* v. *Maryland*, 4 Wheat. 316, it has been settled that no appropriate instrument for carrying into effect the powers committed to the General Government is subject to State taxation. In that case Chief Justice Marshall said (p. 431):

> That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.

And again (p. 433):

> The question is, in truth, a question of supremacy; and if the right of the States to tax the means employed by the General Government be conceded, the declaration that the Constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.

This principle has never been departed from, and has often been reasserted and applied. *Farmers Bank* v. *Minnesota*, 232 U. S. 516, 521; *Choctaw & Gulf R. R.* v. *Harrison*, 235 U. S. 292, 298; *Indian Oil Co.* v. *Oklahoma*, 240 U. S. 522, 529. In *United States* v. *Rickert*, 188 U. S. 432, it was decided that trust allotments and personal property issued to Indian allottees could not be taxed by a State be-

cause this would be "to tax an instrumentality employed by the United States for the benefit and control of this dependent race" (p. 437), and because, if this could be done, "then the obligations which the Government has assumed in reference to these Indians may be entirely defeated" (p. 438).

In *United States* v. *Thurston County*, 143 Fed. 287, the Government sued to enjoin the collection of taxes assessed against the proceeds of the sales of inherited Indian lands which had been deposited in bank by order of the Secretary of the Interior. The lands which had been sold were subject to restrictions upon alienation, and the sales were permitted by the Act of May 27, 1902 (32 Stat. 245, 275), "subject to the approval of the Secretary of the Interior." The Secretary, under regulations prescribed by him, conditioned his approval upon a deposit of the proceeds in the bank to the credit of the Indian and subject to disbursement for his benefit only on checks approved by the proper officials of the Indian Bureau. The Circuit Court of Appeals for the Eighth Circuit decided that the funds so deposited were not taxable, and said (pp. 291–292):

> By rules and regulations approved October 4, 1902, and amended September 16, 1904, and May 25, 1905, the Secretary provided that owners of inherited Indian lands might be permitted to sell them on condition that they agreed that the proceeds of such lands should be placed in one or more banks, which should furnish satisfactory bonds to guaranty

the safety of the deposits, to the credit of each heir in proper proportion, subject to the checks of such heirs only when approved by the agent or officer in charge for amounts not exceeding $10 to each in any one month, and subject to their checks for larger amounts only when approved by the agent specifically authorized by the Commissioner of Indian Affairs. The acts of Congress authorized the Secretary to make these regulations for the purpose of carrying into effect the Act of 1902, and, when made, they had the force of statutory enactments. Rev. Stat. §§ 441, 465 [U. S. Comp. St. 1901, pp. 252, 264]; U. S. v. Eaton, 144 U. S. 688, 12 Sup. Ct. 764, 36 L. Ed. 391; Wilkins v. U. S., 96 Fed. 837, 37 C. C. A. 588. The Indians whose rights are under consideration made the sales of their lands subject to the conditions prescribed by these rules. The bank and a surety executed a bond in the sum of $50,000 to the United States, conditioned that it would pay the rate of interest upon the proceeds of the sales of these lands deposited with it which should be agreed upon by it and the Commissioner of Indian Affairs, and that it would pay over the deposits in the manner provided in the regulations of the Secretary of the Interior to which reference has been made. The proceeds of these sales were deposited with this bank under this bond and under these rules. These facts, the statutes, and the principles of equity jurisprudence which have been considered, have led our minds to these conclusions:

> As the Secretary of the Interior was empowered to permit or forbid the sales of these inherited Indian lands, he had authority to determine upon what conditions he would allow such sales, and to prescribe and enforce the terms specified in his regulations upon this subject. The allotted lands were held in trust by the United States for the benefit of those to whom they were assigned, and their heirs, under the Acts of August 7, 1882, and February 8, 1887. The proceeds of the sales of these lands have been lawfully substituted for the lands themselves by the trustee. The substitutes partake of the nature of the originals, and stand charged with the same trust. The lands and their proceeds, so long as they are held or controlled by the United States and the term of the trust has not expired, are alike instrumentalities employed by it in the lawful exercise of its powers of government to protect, support, and instruct the Indians, for whose benefit the complainant holds them, and they are not subject to taxation by any State or county.

This decision was rendered March 21, 1906, no appeal was taken, and it has ever since been universally regarded as a controlling authority.

No reason is perceived why the principle of these authorities should not govern the present case. The investment of funds held in trust for an incompetent Indian in a home for him, with restrictions on its alienation or incumbrance, is hardly less an instrumentality for carrying out the purposes and policies of the Government than

the holding for him of a title in trust or the issuance to him of personal property, as in the *Rickert* case, or the deposit of his funds in bank to be used for his benefit, as in the *Thurston County* case. This was the conclusion reached by the Secretary of the Interior. After a careful consideration of the question for the purpose of instructing the Commissioner of Indian Affairs, he said (43 L. D. 26, 31):

> Congress has conferred upon the Secretary of the Interior authority to prescribe regulations and conditions to govern the sale of Indian allotted lands as well as the expenditure of the proceeds which implies an exclusion of all other authority. The lands and proceeds are held by the Government for a specified period in trust for the Indians, such trust being an agency for the exercise of a Federal power and therefore outside the province of State authority. It follows that trust land conveyed by a husband to his wife, or other trust land purchased with trust funds, as well as unrestricted lands purchased with trust funds, after deeds therefor containing restrictions against alienation have been approved, are not subject to taxation.

Counsel for the appellant contends that the doctrine of these authorities does not apply to the present case because Panther is a citizen of the United States and of the State. This contention appears not to have been advanced in the *Rickert* case, although the Indians concerned in that case were citizens and subject to the laws of the State by virtue of the General

Allotment Act of February 8, 1887 (24 Stat. 388, 390, § 6). This contention was advanced and rejected in the *Thurston County* case, 143 Fed. 288. And it has long been settled that the grant of citizenship to an incompetent Indian is not inconsistent with the exercise of continued guardianship over him or the adoption of measures for his protection. *United States* v. *Nice*, 241 U. S. 591, 598, and cases cited.

It is also suggested that because Panther enjoys the benefits of the state laws he ought not to be given this "advantage over his white neighbor." This suggestion was made in the *Rickert* case and was there fully answered as follows (188 U. S. 432, 445):

> It is said that the State has conferred upon these Indians the right of suffrage and other rights that ordinarily belong only to citizens, and that they ought, therefore, to share the burdens of government like other people who enjoy such rights. These are considerations to be addressed to Congress. It is for the legislative branch of the Government to say when these Indians shall cease to be dependent and assume the responsibilities attaching to citizenship. That is a political question, which the courts may not determine. We can only deal with the case as it exists under the legislation of Congress.

It is finally urged for the appellant that the trust fund invested in the property sought to be taxed was itself made taxable by section 7 of the Act of April 18, 1912 (37 Stat. 86, 88). Counsel say that this proposition "is not controlling." We think it would be

controlling if it were correct. But it is not correct. Section 7 reads as follows:

> That the lands allotted to members of the Osage tribe shall not in any manner whatsoever be encumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency, or removal of restrictions on alienation; nor shall the lands or funds of Osage tribal members be subject to any claim against the same arising prior to grant of a certificate of competency. That no lands or moneys inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs: *Provided, however,* That inherited moneys shall be liable for funeral expenses and expenses of last illness of deceased Osage allottees, to be paid upon order of the county court of Osage County, State of Oklahoma: *Provided further,* That nothing herein shall be construed so as to exempt any such property from liability for taxes.

It is said that the trust fund to the credit of an incompetent Indian is made taxable by the concluding proviso:

> That nothing herein shall be construed so as to exempt any such property from liability for taxes.

The section deals with two classes of property in two separate and distinct clauses: first, restricted

lands and trust funds of incompetent tribal Indians, and second, inherited lands and moneys of deceased allottees. As to the first, it is specifically provided that they shall not be "subject to any claim against the same arising prior to grant of a certificate of competency." As to inherited lands and moneys, the language is entirely separate as if in a separate section, and it is to "such property" that the proviso in question is made to apply. To hold that the concluding proviso applies to the first part of the section would destroy the effect of that which Congress was careful to make very explicit and with which the proviso has no proper connection. Moreover, to extend this proviso to such a length would render taxable by the State any of the trust funds held in the treasury of the United States under the Act of 1906 which the Secretary of the Interior might not see fit to release under section 5 of the Act of 1912. Finally, the proviso does not purport to render taxable any Indian property, but only seeks to prevent a possible construction which would exempt "inherited lands" which were made taxable by section 1 of the Act.

CONCLUSION.

Frankness compels us to say that we think the court is without jurisdiction to consider the questions involved in this direct appeal, but if we should be mistaken in this, it is respectfully submitted that the decree of the District Court should be affirmed.

FRANCIS J. KEARFUL,
Assistant Attorney General.

January, 1918.

APPENDIX.

REGULATIONS FOR APPLICATIONS FOR OSAGE FUNDS.

[Under sec. 5 of the act of Apr. 18, 1912 (37 Stat. L., 88), Public No. 125.]

The act of April 18, 1912 (37 Stat. L., 86) reads, in part, as follows:

"SEC. 5. That the Secretary of the Interior, in his discretion, hereby is authorized, under rules and regulations to be prescribed by him and upon application therefor, to pay to Osage allottees, including the blind, insane, crippled, aged, or helpless, all or part of the funds in the Treasury of the United States to their individual credit: *Provided*, That he shall be first satisfied of the competency of the allottee or that the release of said individual trust funds would be to the manifest best interests and welfare of the allottee: *Provided further*, That no trust funds of a minor or a person above mentioned who is incompetent shall be released and paid over except to a guardian of such person duly appointed by the proper court and after the filing by such guardian and approval by the court of a sufficient bond conditioned to faithfully administer the funds released and the avails thereof.

"SEC. 6. That from and after the approval of this act the land of deceased Osage allottees * * * may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the State of Oklahoma; * * * the proceeds of such part of the sale * * * due minor heirs, including such minor Indian heirs as

may not be tribal members and those Indian heirs not having certificates of competency, shall be paid into the Treasury of the United States and placed to the credit of the Indians upon the same conditions as attach to segregated shares of the Osage national fund, or with the approval of the Secretary of the Interior paid to the duly appointed guardian. The same disposition as herein provided for with reference to the proceeds of the inherited lands sold shall be made of the money in the Treasury of the United States to the credit of deceased Osage allottees."

In order to put into effect the provisions of the aforesaid section 5 the following rules and regulations governing applications for moneys, original and inherited, segregated under the Osage act of June 28, 1906 (34 Stat. L., 539), and proceeds of sale of inherited lands paid into the Treasury under section 6 of the Osage act of April 18, 1912, are hereby set forth:

Payment in full or in part of any application under section 5 is entirely discretionary with the Secretary of the Interior, under rules and regulations prescribed by him. The facts in each case will be investigated and reported upon by Government officers, and the services of any person in the capacity of attorney or agent are entirely unnecessary.

Class 1: Competent Indians.

Preparation of application.

The applicant (unless an absentee) must be over the age of 21 years and must make his request in person to the superintendent or one of his representatives, giving the reasons for applying, and stating whether a part or all the money to his credit is desired, and whether he has been induced by any

person to make the application. The superintendent will prepare a claim for the Indian's signature, which signature must be witnessed by an employee of the office or sworn to before the superintendent. The statement of the Indian will then be incorporated in the superintendent's report and recommendation in a space provided for that purpose.

PROOF OF COMPETENCY.

Any Indian who has received a certificate of competency will be considered prima facie competent to handle his trust funds, but further investigation may be made in any case.

One who has not received a certificate of competency, but who has made good use of all moneys paid to him and has properly used the lands and rentals under his control belonging to his minor children may be considered competent to handle his trust funds.

CLASS 2. ADULTS NEITHER AGED, PHYSICALLY DISABLED, NOR INCOMPETENT TO A DEGREE REQUIRING LEGAL GUARDIANSHIP.

MAKING OF APPLICATION.

The applicant (unless an absentee) must make his request in person to the superintendent or one of his representatives, giving the reason why it is made and agreeing to abide by a stipulation in the claim that the money is to be deposited in bank to his credit and expended under the supervision of the superintendent, subject to instructions from the Indian Office, if the Secretary of the Interior so directs.

His statement will be incorporated in the superintendent's report on his application, which application will contain the stipulation referred to.

The superintendent will show in his report whether it would be for the best interests and welfare of the allottee to approve an application for all or any part of his trust funds.

Class 3. Blind, Insane, Crippled, Aged, or Helpless.

(All persons whose funds are applied for under this class will be treated as incompetents, for the reason that those who are adults and competent may apply under class 1.)

MAKING OF APPLICATION.

All applications on behalf of persons in this class must be made by legal guardians, and each application accompanied by certified copies, in duplicate, of letters of guardianship and approved bond and by a statement by the guardian giving the reasons why he considers the withdrawal of the funds for the best interests and welfare of his ward and giving an account of all other moneys he has received belonging to such ward.

CLASSES AND CHARACTER OF PROOF.

(*a*) *Blind.*—Blindness, when total, may be shown by the testimony of two or more witnesses; when less than total, the degree and the extent to which it disables the applicant must be shown by certificate of a physician.

(*b*) *Insane.*—The findings of a court in granting letters of guardianship will be accepted as prima

facie proof of insanity, but further investigation may be made in any case.

(*c*) *Crippled.*—A certificate of a physician to show the manner in which and to what extent the applicant is afflicted will be required.

(*d*) *Aged.*—No age limit will be fixed under this head, but proof as to the physical and mental condition will be required.

(*e*) *Helpless.*—The condition of the applicant must be established by certificate of a physician showing cause and degree of the disability, and whether it is more than temporary.

Applications Generally.

An absentee applicant under class 1 or class 2 may make his statement in writing, properly witnessed and sworn to, giving his post office address and occupation, showing whether he uses intoxicants to excess, is in debt, whether he speaks and understands the English language, and whether he has been induced by another to make the application. He should also show whether he is living with and taking care of his family, and give the number of its members. This statement must be accompanied by affidavits by two or more disinterested persons in good standing, showing whether the applicant is a person of good character, in good physical condition, addicted to the use of intoxicants, and to what extent he is capable of managing his affairs. The witnesses must show their means of knowledge of the applicant, and that they have no interest whatever in the case.

On receipt of the above the superintendent will prepare and forward a claim for the applicant's signature, which signature is to be witnessed by two responsible persons, who must swear before a notary

public as to the Indian's identity, and the application returned to the superintendent, who will submit it with his report and recommendation to the Indian Office.

All applications made under either class are to be signed and submitted in duplicate. Reports and evidence, with the exception of copies of letters of guardianship, need not be in duplicate.

Blanks will be furnished by the Indian Office for applications and superintendent's reports, and these blank reports when properly filled out will show the facts upon which the superintendent bases his recommendation.

In making applications for part of the funds, preference will be given to inherited moneys, and Indians and the superintendent will be guided thereby in making and submitting applications.

Each application will contain a clause stipulating that the Indian, so far as that particular application is concerned, will abide by the decision of the department if a part only of the amount applied for be allowed. The attention of each applicant will be called to this stipulation.

Approved, June 26, 1912.

R. G. VALENTINE,
Commissioner.

SAMUEL ADAMS,
First Assistant Secretary.

DEPARTMENT OF THE INTERIOR
UNITED STATES INDIAN SERVICE
OSAGE INDIAN AGENCY,
Pawhuska, Okla., March 6, 1913.

COMMISSIONER OF INDIAN AFFAIRS,
Washington, D. C.

SIR: I have the honor to recommend that I be authorized to approve the checks of Robert Panther, Osage allottee No. 444, whose balance in bank is $1,855.66, in the amounts and for the purposes specified below:

	Amount of authority.
To pay physicians, nurses, for medicine, laundry bills, emergency operation performed upon applicant for the removal of gall stones	$374.85
For the purpose of paying sundry and divers debts, contracted by applicant and family prior to and during the period of his sickness, to be paid to applicant direct	480.81
To pay part of purchase price of residence in Pawhuska, Oklahoma	1,000.00

NOTE.—Applicant has never been granted a certificate of competency. He reads, writes, speaks, and understands the English language and is competent and qualified to properly disburse the $480.81 above mentioned.

JAMES D. CARROLL,
Agent or Superintendent.

Approved:
J. H. ABBOTT,
Acting Commissioner.

Date, Mar. 18, 1913.

OSAGE TRUST FUNDS. ROBERT PANTHER, OSAGE ALLOTTEE, NO. 444.

DEPARTMENT OF THE INTERIOR,
UNITED STATES INDIAN SERVICE,
OSAGE INDIAN AGENCY,
Pawhuska, Okla, March 6, 1913.

The Honorable
The COMMISSIONER OF INDIAN AFFAIRS,
Washington, D. C.

SIR: Robert Panther, Osage allottee No. 444, was taken seriously ill on February 12, 1913, and relying upon the diagnosis of his case by Dr. Harry Walker, agency physician, who consulted with other reputable physicians of the city, and who suggested that it was absolutely necessary that an immediate surgical operation be performed upon Mr. Panther for gall stones, I authorized Dr. Walker to arrange for the operation. Dr. Walker procured the attendance and services of Dr. M. A. Houser, an eminent physician of Tulsa, Oklahoma, and with other physicians of Pawhuska, operated successfully upon Mr. Panther with the result that he is now convalescent. The expense of this operation, which was performed on February 12, 1913, amounts to $374.85, which is an extremely reasonable charge.

Mr. Panther is now able to be around and out of the care of physicians. He asks for $1,000.00 of his trust funds that he may make a partial payment on residence property in Pawhuska, a home for himself and family, the remainder of the cost of the city property, in the sum of $600.00, to be paid out of land-sales money, due and payable to applicant in April, 1913. Applicant owes sundry and divers debts for small sums of money borrowed from banks and for goods purchased from merchants on credit, to the

amount of about $500.00, and I recommend that $480.81 of applicant's trust funds be paid to him direct and unrestricted that he may satisfy this indebtedness.

I respectfully ask that immediate consideration be given to the attached request to approve the checks of applicant for the purposes and in the sums enumerated, that the operation expenses may be met at the earliest possible date and that the city property may be immediately purchased, so that the family may move therein, have a home, and be provided with sanitary and adequate quarters, which they are not enjoying at this time.

Very respectfully,

JAMES D. CARROLL,
Superintendent.

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tional question, affording ground, if properly raised, for direct appeal from a decree of the District Court.

Upon a direct appeal from the District Court, based upon a constitutional question, all questions involved are open for review and there is no occasion to consider the constitutional question if the case may be disposed of on other grounds.

The Acts of June 28, 1906, c. 3572, 34 Stat. 539, and April 18, 1912, c. 83, 37 Stat. 86, respecting the Osage Indians, do not authorize the Secretary of the Interior to impose restrictions upon private land purchased for a non-competent Osage allottee with his trust money, previously released under § 5 of the latter act, and thus exempt it as a governmental instrumentality, during such restraint, from the power of the State of Oklahoma to tax it and to sell it for the collection of such taxes. *United States* v. *Rickert*, 188 U. S. 432, distinguished.

The land was originally part of the Osage Reservation but had been sold under the Osage Townsite Act, and for some years had been part of the private land in the State and had been taxed as such. The taxes in question were imposed after the purchase for the allottee and attempted imposition of restrictions.

Section 5 of the Act of April 18, 1912, *supra*, authorizing the Secretary of the Interior in his discretion and under rules and regulations to be prescribed by him to pay to any Osage allottee all or any part of the funds held for his benefit when satisfied that the allottee is competent or that the payment would be to his manifest best interests and welfare, and the regulations issued thereunder dated June 26, 1912, both contemplate supervision of the expenditure of the money but not control of property for which the money may be expended. In this case, moreover, where the land purchased was first conveyed to a trustee for the allottee and another, the terms of the trust not here appearing, and later was deeded by the trustee to the allottee with an expressed restriction on alienation, *non constat* that the restriction was a continuation of control reserved by the Secretary rather than an assumption of control of part of the Indian's estate theretofore freed.

Reversed.

THE case is stated in the opinion.

Mr. Preston A. Shinn for appellants.

Mr. Assistant Attorney General Kearful for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Osage Tribe of Indians consisted in 1906 of two thousand persons. Their reservation, located in Oklahoma Territory between the Arkansas River and the Kansas state line, contained about a million and a half acres of fertile well-watered prairie land and of heavily timbered hill lands, largely underlaid with petroleum, natural gas, coal and other minerals. At that time the United States held for the tribe a trust fund of $8,373,658.54, received under various treaties as compensation for relinquishing other lands. The annual income of the tribe from interest on this trust fund and from rentals of grazing, oil, and gas lands was nearly $1,000,000; that is $500 for every man, woman and child, in addition to the earnings of individuals.[1] Congress, concluding apparently that the enjoyment of wealth without responsibility was demoralizing to the Osages, decided upon the policy of gradual emancipation. By Act of June 28, 1906, 34 Stat. 539, it provided for an equal division among them of the trust fund and the lands. The trust fund was to be divided by placing to the credit of each member of the tribe his pro rata share which should thereafter be held for the benefit of himself and his heirs for the period of twenty-five years and then paid over to them respectively (§§ 4 and 5).[2]

[1] Annual Reports, Dept. Interior (1905), pp. 306–312; (1906), pp. 448, 451.

[2] Sec. 4. That all funds belonging to the Osage tribe, and all moneys due, and all moneys that may become due, or may hereafter be found to be due the said Osage tribe of Indians, shall be held in trust by the United States for the period of twenty-five years from and after the first day of January, nineteen hundred and seven, except as herein provided: . . . .

Sec. 5. That at the expiration of the period of twenty-five years from and after the first day of January, nineteen hundred and seven, the lands, mineral interests, and moneys, herein provided for and held in

The lands were to be divided by giving to each member the right to make, from the tribal lands, three selections of 160 acres each and to designate which of these should constitute his homestead. A commission was appointed to divide among the members also the remaining lands, after setting aside enough for county use, school-sites and other small reservations. The oil, gas, coal and other mineral rights were reserved to the tribe for the period of twenty-five years with provision for leasing the same. The homesteads were made inalienable and non-taxable for twenty-five years or until otherwise provided by Congress. All other allotted lands—which were known as "surplus lands," were made inalienable for twenty-five years and non-taxable for three years, except that power was vested with the Secretary of the Interior to issue to any adult member, upon his petition, a certificate of competency, authorizing him to sell all of his surplus lands; and upon its issue all his surplus lands became immediately taxable. By Act of April 18, 1912, § 5,[1] 37 Stat.

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trust by the United States shall be the absolute property of the individual members of the Osage tribe, according to the roll herein provided for, or their heirs, as herein provided, and deeds to said lands shall be issued to said members, or to their heirs, as herein provided, and said moneys shall be distributed to said members, or to their heirs, as herein provided, and said members shall have full control of said lands, moneys, and mineral interests, except as hereinbefore provided.

[1] Act of April 18, 1912, § 5:

Sec. 5. That the Secretary of the Interior, in his discretion, hereby is authorized, under rules and regulations to be prescribed by him and upon application therefor, to pay to Osage allottees, including the blind, insane, crippled, aged, or helpless, all or part of the funds in the Treasury of the United States to their individual credit: *Provided*, That he shall be first satisfied of the competency of the allottee or that the release of said individual trust funds would be to the manifest best interests and welfare of the allottee: *Provided further*, That no trust funds of a minor or a person above mentioned who is incompetent shall be released and paid over except to a guardian of such person duly appointed by the proper court and after the filing by such guardian

86, 87, Congress authorized the Secretary of the Interior to pay to any Osage allottee "in his discretion" "under rules and regulations to be prescribed by him and upon application therefor" all or part of the funds held for his benefit, provided the Secretary is satisfied either that the allottee is competent or that such payment would be to "the manifest best interests and welfare of the allottee."

In 1913 (apparently in March), the Secretary paid from the principal of the trust funds held for Robert Panther, a non-competent [1] allottee, the sum of $1,750, which was applied in payment for a lot of land in the City of Pawhuska. The land when purchased was conveyed to one Brenner as trustee for Robert and Emma Panther, but soon after was conveyed by Brenner to Robert individually. The deed to Robert contained the following clause:

"This conveyance is made and accepted with the understanding, and under the condition that the above described property is to be and remain inalienable and not subject to transfer, sale or incumbrance for a period of eighteen years from the 1st day of July, 1913, except by and with the express consent and approval of the Secretary of the Interior, or his successor in office."

The land was originally a part of the Osage Reservation and became part of Pawhuska when that town was established under the Osage Townsite Act (March 3, 1905, 33 Stat. 1061). When Oklahoma was admitted into the Union in 1907, the town became the City of Pawhuska and a part of Osage County. The land had passed into private ownership before 1908, became taxable then under the laws of Oklahoma and taxes were assessed thereon and

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and approval by the court of a sufficient bond conditioned to faithfully administer the funds released and the avails thereof.

[1] Act of April 18, 1912, § 9:

Sec. 9. The word "competent," as used in this Act, shall mean a person to whom a certificate has been issued authorizing alienation of all lands comprising his allotment, except his homestead.

were paid until about the time of the conveyance to Brenner in trust for the Panthers. Then default was made and the land was sold by the county treasurer for failure to pay taxes for the second half of 1912.

In January, 1917, the United States tendered to the holder of the tax certificate and to the county treasurer the amount of the 1912 and 1913 taxes and penalties and demanded a redemption receipt. The tender was refused, because it did not include the taxes and penalties for 1914, 1915 and 1916; and the county treasurer gave notice of intention to issue the tax deed. Thereupon the United States filed, in the federal District Court for the Western District of Oklahoma, this suit against the county treasurer for an injunction to restrain the issue of the tax deed. The Government contended, that as the land had been bought for Panther and was by deed made inalienable without the consent of the Secretary of Interior, it was while so held an instrumentality lawfully employed by the Government for the protection of an Indian and as such exempt from taxation by the State or any subdivision thereof. On the other hand the county treasurer and the city (which was permitted to intervene) contended that Congress had not authorized the Secretary of the Interior to invest the trust fund for the Indians' benefit or to impose restriction on alienation of property purchased with money from that source; that the insertion in the deed of the provision against alienation did not have the effect of exempting the land from taxation by the State; and that it was not the intention of Congress to do so. It was also contended that such exemption was not within the powers of Congress as limited by Article IV, § 3, and the Ninth and Tenth Amendments of the Constitution; since before imposing the restriction by deed, the land had become a part of the private property subject to the jurisdiction of the State. A decree was entered granting, in effect, an injunction against taxation during the period of restric-

tion of alienation; and the case is brought here on direct appeal under § 238 of the Judicial Code, on the ground that constitutional questions are involved.

The jurisdiction of this court was questioned; but the case is properly here. The constitutional question is substantial, was properly raised below, and was passed upon there. We have, however, no occasion to consider it; since all questions involved in the case are before us, *Northwestern Laundry* v. *Des Moines*, 239 U. S. 486, 491, and there are other grounds on which the decree must be reversed.

Under the Act of June 28, 1906, the Secretary of the Interior had no authority to release or to invest any part of the principal of the trust fund held for Panther. His authority to release rests wholly upon § 5 of the Act of April 18, 1912. That section confers upon him, if application is made therefor, discretion whether to release or to withhold. If the release "would be to the manifest best interests and welfare of the allottee" it may be made although the allottee is not competent, as that term is defined in § 9 of the act. The Secretary is authorized to prescribe the rules and regulations under which such releases shall be made; but he is not given authority to exercise control of any property in which the funds released may thereafter be invested, or otherwise to create with the released funds a governmental instrumentality for the protection of the Osages. Congress apparently believed that, in order to prepare the Indian for complete independence, he must be educated in self-control, and that this could best be done by committing to him gradually the care of his property. That course necessarily involved the risk of some property being lost through improvidence. But in the case of the Osages the risk was not attended by serious danger. Even if the whole trust fund should be released and, despite supervision, improvidently spent, the legally competent allottee would

McCURDY, COUNTY TREASURER OF OSAGE COUNTY, OKLAHOMA, ET AL. *v.* UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 685. Argued January 18, 1918.—Decided March 4, 1918.

Whether, in view of the limitations of Art. IV, § 3, and the Ninth and Tenth Amendments of the Constitution, Congress has power to exempt from state taxation land purchased for a tribal Indian which when acquired was part of the mass of private property subject to the state taxing power and jurisdiction, is a substantial constitu-

still have his homestead and his share in valuable undivided oil, gas and coal rights; and the legally incompetent, his surplus lands in addition. There is nothing in the act or in the facts to which it applies that indicates a purpose to extend governmental control to property in which released funds may be invested. And there are in both the Act of 1906 and in that of 1912 provisions which show that Congress intended to restrict the tax exemption. By § 2 of the Act of 1906 the surplus lands became taxable after three years, even if they remained inalienable. By § 7 of the Act of 1912 both the lands and funds of allottees or their heirs are protected against claims arising prior to competency, inheritance or removal of restrictions; but it is expressly provided "That nothing herein shall be construed so as to exempt any such property from liability for taxes."

The regulations issued under date of June 26, 1912, afford no support to the Government's contention. They provide, among other things, that:

(*a*) "One who has not received a certificate of competency, but who has made good use of all moneys paid to him and has properly used the lands and rentals under his control belonging to his minor children may be considered competent to handle his trust funds."

(*b*) (In case of adults neither aged, physically disabled, nor incompetent to a degree requiring legal guardianship, the applicant must agree) "to abide by a stipulation in the claim that the money is to be deposited in bank to his credit and expended under the supervision of the superintendent, subject to instructions from the Indian Office, if the Secretary of the Interior so directs."

Like the act under which they are framed, these regulations contemplate supervision of the expenditure of money, not control of the property, if any, for which the money is expended. They tend to confirm the contention of the appellants that after the money is paid out of the bank it

and property in which it may be invested are to be free from any restriction. Under the Act of 1906, the Secretary of the Interior when applied to for a certificate of competency was confronted with serious alternatives. If he issued the certificate, all the allottee's surplus lands—about 495 acres [1]—would at one time be freed from restrictions on alienation and become subject to disposition by him without governmental control. If the Secretary refused to issue the certificate, the allottee would (unless the certificate were granted later) remain, until the end of the twenty-five year period, in the enjoyment of the income merely; and at the end of that period, he or his heirs though unaccustomed to the control of property, would get absolute dominion at one time over the (a) homestead, (b) surplus lands, (c) the trust fund ($3,928.50),[2] and (d) his share of the interest in the oil, gas, coal and mineral rights. The Act of 1912 made possible the release of parts of the trust fund from time to time. The risks to be incurred at any one time could be made quantitatively as small as the Secretary of the Interior might deem advisable; and by the regulations the risk was reduced in degree, by virtue of the requirement that the money must be "deposited in bank and expended under supervision of the superintendent, subject to instructions from the Indian Office, if the Secretary of the Interior so directs." The policy of education and development through the bank account had been tried and found promising.[3] The regulations greatly extended

[1] Report of Com. of Indian Affairs (1912), p. 63.

[2] Report of Com. of Indian Affairs (1910), p. 47.

[3] Report of the Com. of Indian Affairs (1912), pp. 64, 66: "As the keynote of Indian progress has been individualism, perhaps the most effective general action taken during the fiscal year was the sending of a personal letter to each superintendent handling individual Indian funds in order to impress upon his mind a most important consideration—that the funds of an able-bodied Indian should be handled in such a way as not to weaken his moral stamina as a man."

the field of operation by providing that one legally incompetent might get such release where he had made good use of the moneys theretofore paid him or of the lands under his control. It is education through the responsibility for spending, not the property purchased with released moneys, which constitutes the instrumentality employed by the Government in fitting the individual Osage Indian to take his full part as a citizen of the United States.

Furthermore, in the case at bar it is not shown that the money released from the trust was invested directly in property restricted as to alienation. Apparently Panther's money had been released six months before the deed to him was executed and was used to pay for a conveyance of the land to Brenner, as trustee for Robert and Emma Panther. What the terms of the trust were, does not appear. But there is nothing in the record to indicate that a restriction upon the alienation of the land was among them or that the Secretary of the Interior expressly reserved control over the property or its proceeds. It may well be that the Commissioner of Indian Affairs then believed that an ordinary trust of the property for a short period would best advance the interests of Panther. It is consistent with the facts shown that the restriction upon alienation inserted in the deed was not a continuation of control reserved by the Secretary of the Interior, but a bringing under his control of a part of Panther's estate theretofore freed. In this respect and others the present case differs from *United States* v. *Thurston County*, 143 Fed. Rep. 287, much relied upon by the Government. There is also a clear distinction between the present case and those like *United States* v. *Rickert*, 188 U. S. 432, where it was sought to tax property, the legal title of which was in the United States and which was held by it for the benefit of Indians.[1]

[1] See *United States* v. *Pearson*, 231 Fed. Rep. 270.

263. Counsel for Plaintiff in Error.

While an Indian is still a ward of the Nation, there is power in Congress even to reimpose restrictions on property already freed; *Brader* v. *James*, decided this day, *ante*, 88; but Congress did not confer upon the Secretary of the Interior authority to exercise such power under the circumstances of this case or to give to property purchased with released funds immunity from state taxation.

The decree is reversed with directions to dismiss the bill.

Reversed.